Supreme Court, U.S.
FILED
06-880 JAN 18 2006
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RDC GOLF OF FLORIDA I, INC., a Florida Corporation,
Petitioner,

v.

GEORGE P. APOSTOLICAS, individually and derivatively of HEATHROW GOLF COMPANY LIMITED PARTNERSHIP, a Florida Limited Partnership,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida for the Fifth District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

When a court is determining whether to vacate an arbitration award for "evident partiality" pursuant to 9 U.S.C. § 10, and state arbitration statutes containing identical language, arising from an arbitrator's undisclosed, contemporaneous relationship with counsel for one of the parties, does this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) require the petitioner to show that an arbitrator's undisclosed relationship created an "impression of possible bias" or to demonstrate actual bias on the part of the arbitrator?

PARTIES TO THE PROCEEDING

The following are all parties to the proceeding in the court whose judgment is sought to be reviewed:

Petitioner RDC Golf of Florida I, Inc.

Respondent George Apostolicas, individually and derivatively on behalf of Heathrow Golf Company Limited Partnership

Petitioner RDC Golf of Florida I, Inc. is not publicly traded and there is no publicly traded corporation which owns more than 10% of its stock.

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CITATIONS OF REPORTS OF DECISIONS BELOW

The decision of the District Court of Appeal of Florida for the Fifth District is reported at 925 So.2d 1082 (Fla. 5th DCA 2006). The decision of the Florida Supreme Court denying discretionary review and the decision of the Circuit Court for Seminole County, Florida, are unreported.

BASIS FOR JURISDICTION

The judgment sought to be reviewed was issued by the District Court of Appeal of Florida for the Fifth District on March 17, 2006. Rehearing was denied on April 16, 2006. The Supreme Court of Florida denied discretionary review (with the Chief Justice dissenting) by order dated September

21, 2006. Each of these decisions are contained in the Appendix.

Jurisdiction arises in this Court pursuant to 28 U.S.C. § 1257(a) in that Petitioner seeks review by this Court of a decision of the highest Court of a state in which a decision could be had arising from a right or privilege set up or claimed under the statutes of the United States.

STATUTES INVOLVED IN THE CASE

9 U.S.C. § 10(a)(2):

> (a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration . . .
>
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;

Fla. Stat. Ann. § 682.13(1)(b):

> (1) Upon application of a party, the court shall vacate an award when: . . .
>
> (b) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.

STATEMENT OF CASE

RDC Golf of Florida I, Inc. ("RDC") filed this action in Seminole County, Florida Circuit Court (the "Trial Court") seeking to vacate an arbitration award in favor of George P. Apostolicas ("Apostolicas"). RDC sought relief, pursuant to Fla. Stat. Ann. § 682.13(1)(b) as a result of evident partiality by the Chief Arbitrator. The "evident partiality" arose from the Chief Arbitrator's failure to disclose to RDC that, contemporaneously with the underlying arbitration hearing, deliberations and award, he and Apostolicas' attorney were

both actively participating in a 15-year, $3+ million renewal employment contract for the rabbi at their synagogue.

RDC argued that, pursuant to *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968) and numerous cases in the U.S. Courts of Appeal and State supreme courts, the undisclosed, concurrent relationship created an impression of possible bias, which constituted "evident partiality" for purposes of vacating the arbitration award. Both the Trial Court and the District Court of Appeal followed a conflicting line of cases in other U.S. Courts of Appeal and other State supreme courts which construe *Commonwealth Coatings* as a plurality rather than a majority opinion and interpret Justice White's concurring opinion as holding that it is necessary to demonstrate actual bias on the part of the arbitrator with an undisclosed relationship. As a result, those courts refused to vacate the arbitration award where there was no demonstration of actual bias on the part of the arbitrator.

A. Heathrow Golf Company Limited Partnership

Appellant Heathrow Golf Company Limited Partnership ("Heathrow") was formed for the purpose of owning and operating the Heathrow Golf and Country Club located in Heathrow, Florida. Heathrow has three Partners. The Ronald A. Schiavone Living Trust ("Schiavone Trust") and Appellee George P. Apostolicas are the two Limited Partners, each holding equal equity interests. Appellant RDC Golf of Florida, I, Inc. ("RDC") is the General Partner of Heathrow.

B. The Arbitration And Chief Arbitrator Grodin's Involvement In The Rubinger Contract

On October 2, 2002, Apostolicas filed a derivative and individual action with the American Arbitration Association ("AAA"), against RDC as General Partner of the Heathrow Partnership. Apostolicas claimed that RDC had mismanaged Heathrow's affairs and violated Heathrow's Limited Part-

nership Agreement in various ways. Apostolicas sought to remove RDC as General Partner and damages. RDC answered and counter-claimed.

The case was assigned to be heard before Arbitrators James Grodin, James Lussier and Joseph Goldstein. The Panelists selected James Grodin as Chairman. In accordance with the AAA Rules, Mr. Grodin made an initial disclosure. On January 31, 2003 Mr. Grodin wrote:

> I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters. His family and mine belong to the same Synagogue, and when I was Synagogue president his wife served on the Executive Committee and Board over which I presided. I served as a sole arbitrator on a matter in which Mike Levin represented one of the parties. (30a)

Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. Beginning approximately three months before the arbitration hearing, in February 2004, Apostolicas' counsel, Michael Levin, began representing Rabbi Aaron Rubinger in negotiations to renew an employment contract with Congregation Ohev Shalom. At or about the same time, the President of Ohev Shalom designated Chief Arbitrator Grodin and congregant, Bill Sholk, to represent the Temple in connection with the contract negotiations with Mr. Levin. Despite the pendency of the arbitration and the approaching trial at the time he was appointed to the two member "committee", Chief Arbitrator Grodin disclosed nothing of this matter to Petitioners. However, Mr. Grodin advised Mr. Sholk that he could help with the paperwork, but could not be directly involved in the negotiations because of the pending arbitration involving Mr. Levin.

From February through April 2004, Mr. Sholk and Mr. Levin exchanged proposals for incorporation into the rabbi's

new contract. The Trial Court found that that Mr. Sholk was the negotiator on behalf of the synagogue and that Mr. Grodin provided him legal counsel and prepared all of the drafts of the rabbi's contract.

After Mr. Grodin's return from a three-week cruise in Asia in early April 2004, he began drafting the rabbi's new contract, based upon the term sheets. On April 26, 2004, Grodin forwarded a draft of the proposed contract to Bill Sholk for his review. The draft contract was circulated among the other members of the synagogue's negotiating team. Over the next two days, Mr. Grodin produced three additional drafts of the agreement, incorporating comments from the synagogue's team and suggesting ways to address issues raised by the synagogue team. When the draft contract was ready to send to Mr. Levin, it was emailed to Mr. Sholk on the morning of April 29, who, in turn, forwarded it to Mr. Levin.

Five days after Chief Arbitrator Grodin produced what was by then the fourth draft of the rabbi's contract, and delivered that draft to Mr. Sholk for distribution to Mr. Levin, the RDC/Apostolicas arbitration hearing commenced. At the outset of the hearing, Chief Arbitrator Grodin made the following disclosure on the record:

> As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the attorneys had not known the arbitrators. So long as the litigants understand that, we have no problem proceeding. (30a-31a)

Mr. Grodin made no mention of the simultaneous and ongoing Rubinger contract negotiation.

The hearings regarding the claims between Apostolicas and RDC then officially began and evidence was presented to the Panel on May 3, 5, 6, 7, 12, 14 and 21. On the final day of

live testimony, Appellant's counsel overheard a portion of a conversation between Chief Arbitrator Grodin and Mr. Levin regarding something about a rabbi's contract and Mr. Levin told Mr. Grodin that he would review it on the plane. The hearing closed on July 7, 2004.

While the hearing was open, and while the award was being deliberated, Chief Arbitrator's Grodin's involvement in the Rubinger transaction became even more extensive. Mr. Levin's initial comments to the draft contract raised substantial issues regarding severance and termination for disability prior to the end of the contract's 15-year term which were not addressed in the draft. Those issues immediately caused friction between Mr. Levin and Mr. Sholk. As the Trial Court found:

> Disability became a contentious issue between Bill Sholk and Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and "obnoxious" e-mails. (42a-43a)

The negotiations between the two sides led to a flurry of emails regarding the issues Mr. Levin had raised. Mr. Grodin was either copied on the emails between Mr. Sholk and Mr. Levin, or Mr. Grodin communicated directly with Mr. Levin. As the Trial Court found,

> The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment contract from June 11th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other. (43a)

The Trial Court summarized the emails exchanged as follows:

06/11/04 E-mail from Michael Levin to Bill Sholk, cc: Rabbi, B. Yarmuth, Burt Chasnov, J. Bornstein, Jim Grodin, (I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations.)

06/14/04 E-mail from Bill Sholk to Michael Levin (The changes that were made to the disability section . . . They are material to the contract and were agreed upon by both sides. We are now re-negotiating the contract which has been voted on and approved by the executive board and board . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (. . . We are not re-negotiating and simply tying to document the deal made. You are equally wrong about . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (I also would point out that it is not productive to make accusations of "re-negotiating". . . Let's get this put to bed.)

06/14/04 E-mail from Bill Sholk to Burt Chasnov, cc: Jim Grodin, J. Bornstein Subject: another salvo fired from Levin.

06/14/04 E-mail from James Grodin to Michael Levin, Subject: Discretionary Fund (Mike—I have been following the emails. Here is the problem . . . . This is really a bit of a tempest in a teapot . . .)

06/15/04 E-mail from Jim Grodin to Michael Levin (As my kids used to say, my tummy is getting tired.)[1]

06/16/04 E-mail from Michael Levin to Bill Sholk (You are fundamentally wrong . . .)

6/16/04 E-mail from Michael Levin to Bill Sholk (Bill, attached is an e-mail that I received this morning from the Rabbi. He has asked me to share the email with you and your team)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (Call me on my cell. Jim)

6/16/04 E-mail from Michael Levin to Jim Grodin, Subject: Some Synagogue History you need to know (I left a message on your cell. My cell is 321-439-4863. I am meeting Judy for lunch at 1 but otherwise can be reached on the cell all day.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (I'll call when I finish my meeting.)

6/16/04 E-mail from Michael Levin to Bill Sholk, cc: Burt Chasnov, Jim Grodin, J. Bornstein, Rabbi, B. Yarmuth (Hello, all. Following conversations with Jim Grodin and Rabbi Rubinger this afternoon, I am working on a new proposal on the disability issue that I hope to present sometime later this evening. Jim, I will write it so that it can be dropped into the draft contract if acceptable to all.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Bill Sholk cc: Burt Chasnov, J. Bornstein, Rabbi, B. Yarmuth (Thanks Mike)

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[1] Jim Grodin's oldest son (now a doctor) used to say this as a young child when he was frustrated.

6/17/04 E-mail from Michael Levin to Bill Sholk, Jim Grodin, B. Chasnov, J. Bornstein. (Rabbi and I worked late last night on a new proposal on the disability issue. I am waiting for his final comments and hope to get it to you by mid-morning . . .)

6/17/04 E-mail from Michael Levin to Bill Sholk, J. Grodin, B. Chasnov, J. Bomstein, Subject: Attached is a proposed compromise on the disability provision. Please let me know your comments.

06/18/04 E-mail from Michael Levin to Jim Grodin, Bill Sholk. (I was just wondering if there is any response to our proposal on the disability issue . . .)

6/18/04 E-mail from Jim Grodin to Michael Levin (I am out of the loop on the negotiating end. You have to check with Bill.) (43a-45a)

As Mr. Grodin requested in the June 16 email exchange, Mr. Levin and Chief Arbitrator Grodin spoke on the telephone that day. Chief Arbitrator Grodin told Mr. Levin "to 'cut the crap,' come up with a new suggestion and that the contract was going nowhere, that he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS." (45a-46a) Mr. Levin did exactly as Chief Arbitrator Grodin suggested. Later that afternoon, Mr. Levin sent an email to everyone involved stating: "Following conversations with Jim Grodin and Rabbi Rubinger this afternoon, I am working on a new proposal on the disability issue that I hope to present some time later this evening. Jim, I will write it so that it can be dropped in the draft contract if acceptable to all." (45a). Chief Arbitrator Grodin, continuing to follow the e-mails, responded to Mr. Levin: "thanks Mike". (*Id.*)

The next morning, June 17, 2004, Mr. Levin sent an email to James Grodin and Bill Sholk attaching a modified draft of

the agreement with a proposed compromise on the disability provision. The very next day, the parties to the arbitration submitted their briefs and proposed findings to the arbitration panel. (46a) Mr. Levin sent his final trial brief to Mr. Grodin in the RDC arbitration.

On June 21, Chief Arbitrator Grodin sent an e-mail to Burt Chasnov suggesting a mechanism to bridge the continued gap between the parties on the termination-for-disability provision. That proposal was passed along to attorney Levin and eventually was agreed to and incorporated into the rabbi's agreement on July 8, the day after the record closed for the arbitration hearing.

On August 4, *two days before* the issuance of the arbitration award, Mr. Grodin forwarded the sixth draft of the rabbi's contract to Mr. Sholk. Mr. Grodin produced another draft on August 5 after incorporating changes requested by Burt Chasnov.

The following day, August 6, the Interim Arbitration Award was entered. In summary, the arbitration award found that RDC had mismanaged the golf club and that Heathrow Golf was a "dysfunctional limited partnership". The panel found that it was "not reasonably practicable to carry on the business of Heathrow Golf with RDC as general partner", and, therefore, removed RDC as general partner. The panel denied, however, Apostolicas' claim for damages.

C. RDC Seeks To Overturn The Arbitration Award

Appellants filed a petition to vacate the arbitration award on Monday, August 9. RDC also alleged, upon information and belief, that there was some undisclosed relationship between Chief Arbitrator Grodin and Mr. Levin.[2]

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[2] Over the intervening weekend, Petitioner learned of an ongoing dispute between an Orlando rabbi and his synagogue. Putting together Mr. Grodin's disclosure that he and Mr. Levin attended the same synagogue

The Petition was not served upon Chief Arbitrator Grodin that day. The same day as RDC filed its Petition, Mr. Levin communicated with Mr. Sholk, asking him when Chief Arbitrator Grodin would have the next draft of the rabbi's contract. After further discussion about Burt Chasnov's suggested changes, Mr. Grodin and Mr. Sholk agreed that the contract was complete. RDC's petition was served on the AAA via Federal Express on August 11. That day Mr. Grodin and Mr. Sholk expressed their relief that the contract was done. The final version of the rabbi's contract was signed on September 9.

When the issue of a potential undisclosed relationship between Grodin and Levin was raised by RDC with the AAA, both Mr. Grodin and Mr. Levin repeatedly and vehemently denied having any involvement with each other in the rabbi's contract negotiations. They continued with this position before the Trial Court, even after discovery revealed the extensive contacts between the two of them.

Based on their representations to the AAA of no contact, the AAA reaffirmed Mr. Grodin as chief arbitrator. Nevertheless, on October 11, 2004, Mr. Grodin resigned as arbitrator. On October 25, 2004, the two remaining arbitrators issued a final arbitration award, reaffirming the interim award which all three arbitrators had entered.

On May 4 through 6, 2005, the Trial Court held a hearing with respect to RDC and Heathrow's petition to vacate the arbitration award and Apostolicas' cross-petition to confirm the award. The evidence presented at the hearing was essentially uncontested. RDC argued that the undisclosed relation-

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and the snippet of the conversation between Mr. Grodin and Mr. Levin that Petitioner's counsel overheard on the last day of the arbitration hearing, it appeared to Petitioner that Mr. Grodin and Mr. Levin were on opposite sides of that dispute. As it turned out, the dispute Petitioner learned of involved another synagogue. Petitioner only learned of the contract negotiations between Mr. Grodin and Mr. Levin in discovery.

ship between Mr. Levin and Mr. Grodin created an impression of possible bias and, thus, in accordance with *Commonwealth Coatings*, the undisclosed relationship constituted "evident partiality" for purposes of vacating the arbitration award.

On June 21, 2005, the Trial Court issued the Order confirming the arbitration award and denying RDC and Heathrow's petition to vacate. The Trial Court found that the relationship between Messrs. Grodin and Levin should have been fully disclosed, but there was no evidence that the undisclosed contract negotiations between Mr. Levin and Chief Arbitrator Grodin would tend to bias Mr. Grodin's judgment in favor of Apostolicas or Mr. Levin and, therefore, concluded that there was no evident partiality which would warrant vacating the arbitration award.

In that Order, the Trial Court discussed the standard for vacating an arbitration award as a result of an undisclosed relationship, based upon *Commonwealth Coatings* and its progeny, at length.

> 26. The seminal case in this area is the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), which involved the question of whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. In *Commonwealth Coatings*, the Supreme Court set aside the arbitration award for evident partiality where the arbitration did not disclose his close financial relations with a contractor that had existed for many years. *Id.* At 148-149. These close business connections were not made known to the losing party to the arbitration until after an award had been entered. Justice Black, writing for a plurality of the Court, stated:
>
> > It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get

> all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. *Id.*

Justice White, in a concurring opinion, stated:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. It is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function . . . This . . . means that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial,
>
> * * *
>
> Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award. *Id.* at 150-152.

27. In *Lifecare Intern. Inc.* v. *CD Medical, Inc.*, 68 F.3d 429, 432 (11th Cir. 1995), the Eleventh Circuit stated the test for evident partiality in nondisclosure cases as follows:

> In order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a "reasonable impression of partiality." *Middlesex Mut. Ins. Co. v Levine*, 675 F.2d 1197, 1201 (11th Cir. 1982); *Schmitz v. Zilverti*, 20 F.3d 1043, 1048 (9th Cir. 1994). The Court has reasoned that the alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Levine*, 675 F.2d at 1201; *accord, Consol. Coal v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1995); *Health Services Management Corn. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir. 1992). Accordingly, the mere appearance of bias or partiality is not enough to set aside an arbitration award. *Consol. Coal*, 48 F.3d at 129; *Health Services Management Corp.*, 975 F.2d at 1264; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir. 1984); *see Schmitz*, 20 F.2d at 104647 (rejecting "appearance of bias" standard). (Emphasis added).

28. Most recently in *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002), the Eleventh Circuit ruled as follows:

> an arbitration award may be vacated due to the evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose information which would lead a reasonable person to believe that a potential conflict exits. *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998) (citing *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) and *Middlesex Mut. Ins. Co, v. Levine*, 675 F.2d 1197, 1202 (11th Cir. 1982). (35a-38a)

D. RDC Appeals the Trial Court decision

RDC appealed the Trial Court's decision to the District Court of Appeal of Florida for the Fifth District. There, RDC argued that the Trial Court should be reversed because, according to *Commonwealth Coatings*, the appropriate standard for vacating an arbitration award in the event of an undisclosed relationship is "appearance of possible bias", not the actual bias standard applicable to ordinary arbitration cases which the Trial Court applied.

The Fifth District Court of Appeal likewise found that the contemporaneous relationship between Messrs. Grodin and Levin should have been disclosed but, nevertheless affirmed the Trial Court, applying an actual bias standard. The Court of Appeal also discussed, and purported to apply, the standards set forth by *Commonwealth Coatings* and its progeny. Indeed, the Fifth District noted the lower courts differing interpretations of *Commonwealth Coatings*.

> Both Florida and federal law hold that evident partiality is a basis to vacate an arbitration award. § 682.13(1)(b), Fla. Stat. (2004); 9 U.S.C. § 10(a)(2). Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive. *See Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So.2d 676, 679 (Fla. 5th DCA 2004). However, while decisions of federal courts are persuasive, we are bound only by decisions of the United States Supreme Court. *See Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32, 35 (Fla. 2d DCA 2005); *Raymond James Fin. Servs., Inc. v. Saldukas*, 851 So.2d 853, 856 (Fla. 2d DCA 2003).
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> * * *
>
> The Federal Arbitration Act likewise authorizes the court to vacate an arbitration award "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). However, "evident par-

> tiality, like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms. No jurist has yet coined an exacting legal standard for 'evident partiality,' although many have tried." *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-MARCUS, 1986 WL 20915, *3-4 (S.D.Fla. Sept.17, 1986) (citations omitted). The definitional difficulties of "evident partiality" notwithstanding, it is settled that the evident partiality inquiry is a case-specific and fact-intensive one. *See Lifecare*, 68 F.3d at 435 (stating that the question of evident partiality is "fact intensive" and "highly dependant on the unique factual settings of each particular case").
>
> The leading United States Supreme Court case concerning claims of arbitral evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Thus, any inquiry must begin there. (16a-18a)

After quoting extensively from *Commonwealth Coatings*, the Fifth District discussed subsequent interpretations of *Commonwealth Coatings* by the lower courts. (20a-23a) The Fifth District further noted the dispute as to whether Justice Black's opinion was a plurality or majority decision (19a, n. 2), and the "muddled state of the law" created by *Commonwealth Coatings*. (20a, n. 3). The Fifth District concluded that an "appearance of bias" was insufficient to vacate an arbitration award, that it was necessary to demonstrate "a reasonable impression of partiality that was direct, definite, and capable of demonstration".

> Following *Commonwealth Coatings*, the interpretation of what has come to be referred to as the "reasonable impression of partiality" standard has varied somewhat among the different federal courts considering it. The Eleventh Circuit has said that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information that

would lead a reasonable person to believe that a potential conflict exists. *Univ. Commons-Urbana Ltd.*, 304 F.3d at 1339; *Middlesex Mut. Ins. Co.*, 675 F.2d 1197, 1202 (11th Cir.1982). The party challenging the arbitration award must demonstrate that the undisclosed information creates a "reasonable impression of partiality," *Lifecare*, 68 F.3d at 433 (citation omitted), or put another way, "information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998). The alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain, and speculative." *Id.; see Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 (11th Cir.1998) (holding that "to vacate an arbitration award for evident partiality, the moving party must present evidence that would support a 'reasonable impression of partiality' on the arbitrator's behalf . . . [t]he assertion of partiality, however, must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative' "). Whether these conditions have been met ordinarily requires a fact-intensive inquiry. *Lifecare*, 68 F.3d at 435. In general, "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* at 433 (citing *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir.1995)). If, however, the moving party can show that an arbitrator failed to disclose a substantial relationship between himself and a party, then the less demanding "appearance of bias" standard applies. *Park v. First Union Brokerage Servs., Inc.*, 926 F.Supp. 1085, 1088 (M.D.Fla.1996) (citing *Commonwealth Coatings*, 393 U.S. at 151-52, 89 S.Ct. 337 (White, J., concurring)).

Other courts have reached similar conclusions, *i.e.*, that the party challenging the arbitration award is required to present admissible, credible evidence that

created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir.2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the part of the arbitrator."); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir.1993) (stating that the alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative); *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir.1991) (a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"); *Washburn v. McManus*, 895 F.Supp. 392, 398 (D.Conn. 1994) (stating that there must be more than mere appearance of bias to vacate arbitrator's award); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992) (determining that evident partiality within the meaning of subsection (a) of the FAA means more than the mere appearance of bias; to set aside an award for arbitration partiality, the interest or bias must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative); *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala. 2003)(holding that under "reasonable impression of partiality standard," party challenging arbitration award was required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias); *see also Consol. Coal Co.*, 48 F.3d at 129 (determining that to demonstrate evident partiality under the FAA, the party seeking vacation has burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration, and the reasonable person standard requires a showing of more than the

> appearance of bias); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984) (holding that "'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Supp. 885, 891 (D.Conn.1991) (stating that the party alleging impropriety "must establish facts that create a reasonable impression of bias or misconduct") (citations omitted).
>
> We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the evidence utilizing the "reasonable impression of partiality" standard. As such, we find that the trial court properly weighed RDC's allegations of Grodin's evident partiality by considering whether RDC made a showing through credible evidence, giving rise to a "reasonable impression of partiality" that was "direct, definite, and capable of demonstration," as distinct from a "mere appearance" of bias that was remote, uncertain, and speculative.

(20a-23a) (footnotes omitted)

REASONS FOR GRANTING THE WRIT

THE DECISION BELOW HIGHLIGHTS THE LOWER COURTS' CONFLICTING INTERPRETATIONS OF *COMMONWEALTH COATINGS*

The decisions of the courts below bring into stark contrast the two conflicting lines of authority interpreting this Court's decision in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). *Commonwealth Coatings* squarely addressed and decided the issue of the standard to be applied as to whether an arbitrator's undisclosed relationship with a party constitutes "evident partiality" for purposes of vacating an arbitration award. However, two conflicting lines

of authority have developed in the lower courts, both state and Federal, interpreting *Commonwealth Coatings*.

One line of authority reads Justice Black's opinion as a majority opinion and applies a lower "impression of possible bias" standard as enunciated in that opinion. The other line of authority reads Justice Black's opinion as a merely plurality opinion, with Justice White's concurrence setting an undefined, but conflicting, stricter standard. *Morelite Construction Corp. v. New York City District Carpenters Benefit Funds*, 748 F.2d 79, 83 (2d Cir. 1984) ("much of Justice Black's opinion must be read as dicta, and we are left in the dark as to whether an "appearance of bias" will suffice to meet the seemingly more stringent "evident partiality" standard of 9 U.S.C. § 10."). The *Morelite* court found Justice Black and Justice White's opinions to be "irreconcilable" and deemed itself bound only to the extent that Justices Black and White agreed. *Morelite*, 748 F.2d at 83, n. 3. The Second Circuit then went on to formulate its own rule, that the "appearance of bias" standard was too low and proof of actual bias was too high, so that in order to vacate an arbitration award for "evident partiality", "a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration." 748 F.2d at 83-84. That standard has been applied by most of the courts which read Justice Black's opinion as a plurality, *see* cases cited in note 5 *infra.*, but the more narrow standard is generally interpreted as coming from Justice White's concurrence in *Commonwealth Coatings*.

This case presents the opportunity for the Court to eliminate this split of authority in the lower courts. This is an issue of substantial public importance, particularly in light of the recent rapid increase in the use of alternative dispute resolution. The Court should act to eliminate this conflict, so that arbitrators will know their disclosure obligations, and parties to arbitrations will have a single standard to meet in the event an arbitrator fails to meet their disclosure obliga-

tions, not conflicting standards which will give different results depending upon which state's law applies, or whether an action to vacate an arbitration award is brought in state or federal court.

a) There is a split of authority in the lower courts interpreting *Commonwealth Coatings*

In *Commonwealth Coatings*, one of the arbitrators had failed to disclose he had business dealings with one of the parties to the arbitration. The losing party sought to vacate the adverse arbitration award claiming the undisclosed relationship constituted "evident partiality" which mandated vacating the arbitration award. Even though there was no claim that the arbitrator was anything other than fair and impartial, the arbitration award was vacated because of the arbitrator's failure to disclose the relationship. As Justice Black explained in his opinion:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias.

Commonwealth Coatings, 393 U.S. at 149-50.

Justice White, joined by Justice Marshall, filed a concurring opinion. Justice White began, "While I am glad to join my Brother Black's opinion in this case, I desire to make these additional remarks." *Commonwealth Coatings*, 393 U.S. at 150. Justice White continued:

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is vol-

untary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties. In many cases the arbitrator might believe the business relationship to be so insubstantial that to make a point of revealing it would suggest he is indeed easily swayed, and perhaps a partisan of that party. But if the law requires the disclosure, no such imputation can arise. And it is far better that the relationship be disclosed at the outset, when the parties are free to reject the arbitrator or accept him with knowledge of the relationship and continuing faith in his objectivity, than to have the relationship come to light after the arbitration, when a suspicious or disgruntled party can seize on it as a pretext for invalidating the award. The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award

Commonwealth Coatings, 393 U.S. at 151-52 (White, J., concurring).

Some lower courts have interpreted Justice Black's opinion as being merely a plurality opinion because they read Justice White's concurring opinion as setting a different standard from Justice Black's. *See Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 499-502 *reh'g en banc granted* 449 F.3d 616 (5th Cir. 2006) (discussing different readings of *Commonwealth Coatings* opinion and holding that evident partiality is demonstrated from the non-disclosure itself, regardless of whether actual bias is established.)

> Although Justice White indicated that he was "glad to join" Justice Black's opinion and that he desired to make "additional remarks," and Justice Black's opinion was designated the "opinion of the court," some lower federal courts have seen a conflict between the two writings. Accordingly, by treating Justice Black's opinion as a plurality opinion, some courts have felt free to reject Justice Black's statement that "evident partiality" is met by an "appearance of bias," and to apply a much narrower standard.

Positive Software, 426 F.3d at 500. As a result, beginning with *Morelite* in 1984, two conflicting lines of authority have developed as to the appropriate standard for vacating an arbitration award based upon undisclosed relationships, with one line of cases applying a narrow demonstrable bias standard and the other line of cases applying a broad appearance of possible bias standard. *See Burlington Northern Railroad v. Tuco, Inc.*, 960 S.W.2d 629, 632-636 (Tex. 1997) (tracing history of case law interpreting *Commonwealth Coatings* and conflicting standards).

Both *Positive Software* and *Tuco* trace the development of the two lines of authority as to the standard to be applied in the event an arbitrator fails to disclose a relationship with one of the parties. In summary, the Fifth, Eighth, Ninth and D.C. Circuits, and Arizona, California, Delaware, Maryland,

Michigan, Minnesota, New Jersey, New York, Texas and Wisconsin[3] follow the broader "impression of possible bias" enunciated by Justice Black in *Commonwealth Coatings*[4], while the Second, Fourth, Sixth, and Seventh Circuits, along with Connecticut, the District of Columbia, Illinois, Louisiana, Mississippi, Missouri, Nebraska, Nevada, and Ohio adopting the more narrow interpretation of Justice White's opinion, imposing the same standard as in ordinary cases, a showing of a "reasonable impression of bias."[5] The Eleventh

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[3] *See Positive Software, id.*; *Olson v. Merryl Lynch, Pierce, Fenner & Smith*, 51 F.3d 157, 159-60 (8th Cir. 1995); *Schmitz v. Ziliveti*, 20 F.3d 1043, 1049 (9th Cir. 1994); *Al-Harbi v. Citibank*, 85 F.3d 680, 683 (D.C.Cir. 1996); *Wages v. Smith Barney Harris Upham & Co.*, 188 Ariz. 525, 531-32, 937 P.2d 715, 721-22 and n. 7 (1997); *Wheeler v. St. Joseph Hospital*, 63 Cal.App.3d 345, 133 Cal.Rptr. 775, 793 (1976); *Beebe Medical Center, Inc. v. InSight Health Services Corp.*, 751 A.2d 426, 434-35 (Del.Ch. 1999); *Parks v. Sombke*, 127 Md.App. 245, 252-53, 732 A.2d 907, 911 (1999); *Albion Public Schools v. Albion Education Assn.*, 130 Mich.App. 698, 344 N.W.2d 55, 57 (1983); *Safeco Insurance Co. v. Stariha*, 346 N.W.2d 663, 667 (Minn.Ct.App. 1984); *Barcon Associates v. Tri-County Asphalt Corp.* 86 N.J. 179, 430 A.2d 214, 220 (1981); *Kern v. 303 East 57th St. Corp.*, 204 A.D.2d 152, 611 N.Y.S.2d 547, 548-49 (1st Dept. 1994); *Tuco, id.*; *DeBaker v. Shah*, 194 Wis.2d 104, 553 N.W.2d 464, 467-69 (1995).

[4] The Third Circuit would also be considered following the broader rule, since Justice Black relied in part upon *Rogers v. Schering Corp.*, 165 F.Supp. 295, 301 (D.N.J. 1958) *aff'd* 271 F.2d 266 (3d Cir. 1959) *cited with approval by Commonwealth Coatings*, 393 U.S. at 149. ("The failure of the Administrator to communicate to the parties information disclosed by a prospective arbitrator bearing upon circumstances likely to create a presumption of bias, and the consequent prevention of the party to proffer a timely objection based upon that information, is more than a loose procedural informality. It goes to the heart of a body designed to resolve the controversy—its integrity. In this instance it fails to protect what might be termed "arbitration due process".)

[5] *See Morelite*, 748 F.2d at 84; *Peoples Security Life Ins. Co. v. Monumental Live Insurance Co.*, 991 F.2d 141, 146 (4th Cir. 1993); *Apperson v. Fleet Carrier Corp.* 879 F.2d 1334, 1358 (6th Cir. 1989); *Health Services Management Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.

Circuit and Florida have conflicting authority, some cases following one rule and some following the other.[6]

b) This case presents an issue of great public importance

The Court should grant the petition for certiorari to resolve this important question of arbitration due process which appeared to have been answered by *Commonwealth Coatings*. Arbitration has exploded in recent years as it has become an increasingly popular method of dispute resolution. Hundreds of thousands of arbitrations are conducted each year. In

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1992); *Local 530, AFSCME, Council 15 v. City of New Haven*, 9 Conn.App. 260, 274, 518 A.2d 941, 949 (1986); *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334, 340-41 (D.C.App. 2000); *John E. Reid & Associates*, v. *Wicker-Zulawski & Associates*, 255 Ill.App.3d 533, 194 Ill.Dec. 232, 238, 627 N.E.2d 348, 354 (1993); *In re arbitration between U.S. Turnkey Exploration, Inc. and PSI, Inc.*, 577 So.2d 1131, 1135 (La.Ct.App. 1991); *Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990); *National Ave. Building Co. v. Stewart*, 910 S.W.2d 334, 343 (Mo.Ct.App. 1995); *Dowd v. First Omaha Securities Corp.*, 242 Neb. 347, 357, 495 N.W.2d 36, 42-43 (1993); *Thomas v. City of North Las Vegas*, 127 P.3d 1057, 1069 (Nev. 2006); *Beck Suppliers, Inc. v. Dean Witter Reynolds, Inc.*, 53 Ohio App.3d 98, 558 N.E.2d 1187, 1193 (1988).

[6] *Compare Gianelli Money Purchase Plan and Trust v. ADM Investor Services, Inc.*, 146 F.3d 1309, 1312 (11th Cir. 1998)(arbitration award must be vacated for "evident partiality" when "the arbitrator knows of, but fails to disclose, information which would lead a reasonable person to believe that a potential conflict exists.") *with Lifecare International Inc. v. CD Medical, Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) (in non-disclosure case, "the mere appearance of bias or partiality is not enough"); 23a (to vacate award in non-disclosure case, petitioner must show a "'reasonable impression of partiality' that was 'direct, definite, and capable of demonstration,' as distinct from a 'mere appearance' of bias that was remote, uncertain, and speculative.") *with Weinger v. State Farm Fire & Casualty Co.*, 620 So.2d 1298, 1299 (Fla. 4th DCA 1993)("an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias. Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award.")

addition, most state arbitration statutes are patterned after the Federal Arbitration Act and state courts use Federal precedent, including those of this Court, in interpreting their own state statutes. Indeed, while the decisions of other Federal courts are simply instructive, the decisions of this Court are binding on the state courts. As a result, this Court's interpretation of the term "evident partiality" in the context of an arbitrator failing to disclose a relationship with a party is particularly important. *Commonwealth Coatings* has been cited by over a thousand published opinions in the lower courts, and it is relied upon by both lines of authority in support of their respective positions resulting in two different standards being applied in non-disclosure cases based upon the same authority. It cannot reasonably be read to support two conflicting standards. The Court should decide which standard is correct.

The conflicting standards create an open invitation to forum shopping, since the standard which will be applied depends upon the court in which an action to vacate or confirm an arbitration award is brought. For example, in the nation's commercial center, New York, which standard is to be applied depends upon whether an aggrieved party seeks relief in Federal or state court, since the Second Circuit follows the narrower "reasonable impression of bias" standard, while New York state courts follow the broader "impression of possible bias" standard.

In addition, many of the cases following the narrower standard agree that the proper standard for disclosure is that an arbitrator should disclose any relationship which might create an impression of possible bias, but will vacate an award only where the non-disclosed relationship creates a reasonable impression of bias. That was the situation in the instant case. The Trial Court found, and the Fifth District agreed, that Mr. Grodin should have disclosed his involvement in the contract negations with Mr. Levin, but would not

vacate the arbitration award because the relationship did not create a reasonable impression of bias. This is contrary to the result in *Commonwealth Coatings*, where the arbitrator's partiality was not questioned, but the arbitration award was nonetheless vacated because he had failed to disclose a relationship which created an appearance of bias.

As the court in *Rogers* noted, disclosure of the arbitrators' relationship with the parties, and giving the parties an opportunity to object to an arbitrator or to continue with the arbitration with knowledge of a potential conflict goes to the heart of "arbitration due process." *Rogers*, 165 F.Supp. at 301. Both Justice Black and Justice White in *Commonwealth Coatings* recognized the importance of an arbitrator's disclosure of potential conflicts to the integrity of the arbitration process.

> This rule of arbitration and this canon of judicial ethics rest on the premise that any tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias. We cannot believe that it was the purpose of Congress to authorize litigants to submit their cases and controversies to arbitration boards that might reasonably be thought biased against one litigant and favorable to another.

Commonwealth Coatings, 393 U.S. at 150.

> The arbitration process functions best when an amicable and trusting atmosphere is preserved and there is voluntary compliance with the decree, without need for judicial enforcement. This end is best served by establishing an atmosphere of frankness at the outset, through disclosure by the arbitrator of any financial transactions which he has had or is negotiating with either of the parties.

Commonwealth Coatings, 393 U.S. at 151 (White, J., concurring).

Even if an arbitrator is not actually biased, his failure to disclose a substantial relationship still deprives a party of a important arbitration due process right, the right of the party to make its own decision regarding the arbitrator's partiality in advance of the arbitration hearing.

> The judiciary should minimize its role in arbitration as judge of the arbitrator's impartiality. That role is best consigned to the parties, who are the architects of their own arbitration process, and are far better informed of the prevailing ethical standards and reputations within their business.

Id. The public can have confidence in arbitration only if the process is not only are fair, but also appears to be fair. That confidence is established "by an atmosphere of frankness at the outset", *id.*, but is undermined in cases, such as this one, where the court recognizes that the appearance of fairness requires the disclosure of a substantial relationship between an arbitrator and a party, but leaves the aggrieved party without a remedy if there was no showing that bias infected the arbitration award.

This dual standard discourages, rather than encourages, the openness that both Justices Black and White wrote was necessary for the arbitration process to work properly. In the netherland between relationships which create an "impression of possible bias" and relationships that create a "reasonable impression of bias", a party has a right of disclosure, but no remedy in the event an arbitrator fails to disclose what he should.

An arbitrator has no incentive to disclose anything beyond a clear conflict, since, in the jurisdictions following the narrower standard, a disclosed relationship and an undisclosed relationship will be judged on the same standard, whether the relationship creates an "reasonable impression of bias". Indeed, the arbitrator has an incentive not to disclose a questionable relationship, since if the relationship were

disclosed, he or she would risk an objection from one of the parties and may be forced to withdraw from the arbitration, losing lucrative fees. On the other hand, if the relationship is not disclosed, the arbitrator can participate in the arbitration, and earn his fee. If no one finds out about the relationship, there is no problem, and if someone does find out and seeks to overturn the award, he is in the same position as if the relationship had been disclosed. The award will still be judged by the same standard as if the relationship were disclosed, *i.e.*, whether the relationship created a "reasonable impression of bias".

Clearly, the participants in arbitration, the parties, as well as the arbitrators and the courts called upon to confirm or vacate arbitration awards, should have a uniform standard as to what matters an arbitrator is obligated to disclose, as well as the remedies in the event that an arbitrator fails to fulfill those obligations. This case presents an opportunity to clarify the considerable confusion and conflict in the lower courts which has been created by the differing interpretations of *Commonwealth Coatings*.

CONCLUSION

For the reasons set forth above, Petitioner respectfully requests that the Court grant its Petition for Writ of Certiorari in order to resolve the conflict among the Courts of Appeal and the states as to the interpretation of *Commonwealth Coatings.*

Respectfully submitted,

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APPENDIX A

DISTRICT COURT OF APPEAL OF FLORIDA
FIFTH DISTRICT

No. 5D05-2597

RDC GOLF OF FLORIDA I, INC., *et al.*,
Appellant,

v.

GEORGE P. APOSTOLICAS,
Appellee.

March 17, 2006
Rehearing Denied April 19, 2006

Major B. Harding, of Ausley & McMullen, Tallahassee; John M. Brennan and Richard E. Mitchell of GrayRobinson, P.A., Orlando; James E. Cecchi of Carella, Byrne, Bain, Gilfillan, Cecchi, Stewart & Olstein, Roseland, New Jersey, for Appellant.

Michael R. Levin, of Baker & Hostetler, LLP, Orlando, for Appellee.

ORFINGER, *J.*

RDC seeks review of a final judgment confirming an arbitration award removing it as general partner of Heathrow Golf Company Limited Partnership. RDC alleges the trial court erred by rejecting its claim of evident partiality on the part of one of the arbitrators. We find no error and affirm.

Heathrow Golf is a Florida limited partnership formed to acquire and operate the Heathrow Country Club. George P. Apostolicas and the Schiavone Trust are the limited partners of Heathrow Golf, each owning approximately one-half of the

limited partnership interest. RDC was the sole general partner of Heathrow Golf. Pursuant to the parties' agreement, Apostolicas initiated arbitration against RDC, claiming mismanagement of the Heathrow Country Club. RDC and Heathrow counterclaimed, asserting that Apostolicas breached his fiduciary duty to the partnership by misappropriating Heathrow members for a competing golf club he owned. The issues were heard before a panel of three (3) arbitrators, including Chief Arbitrator Jim Grodin, that ultimately issued an arbitration award expelling RDC as the sole general partner of Heathrow.

Apostolicas petitioned to confirm the arbitration award. RDC and Heathrow filed a counter-petition, which sought to vacate the arbitration award, alleging that Chief Arbitrator Grodin was not impartial because he and Apostolicas's counsel, Michael Levin, were, while the arbitration was pending, involved in volunteer work for their synagogue relating to the renewal of the synagogue's contract with its rabbi. After an evidentiary hearing, the trial court rendered an order confirming the arbitration award, concluding that the relationship between Grodin and Levin was not substantial; that no reasonable person could conclude that the relationship would tend to bias Grodin's judgment; that there was no ex parte communication between Grodin and Levin regarding the subject matter of the arbitration; that the rabbi's contract transaction was synagogue volunteer work; that Levin's action did not curry favor with Grodin in the arbitration proceeding; and that RDC failed to establish the facts concerning the rabbi's contract that "might create an impression of possible bias" towards Apostolicas or Levin.

Of particular relevance to our consideration, the trial court made the following relevant findings of fact[1] and conclusions of law:

> 6. The case was set for Arbitration before Arbitrators James Grodin, James R. Lussier, and Joseph I. Goldstein. James Grodin was selected as the Chief Arbitrator.
>
> 7. On January 13, 2003, Mr. Grodin made the following initial disclosure regarding Apostolicas' counsel, Michael Levin:
>
> > I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters. His family and mine belong to the same Synagogue, and when I was Synagogue president, his wife served on the Executive Committee and Board over which I presided. I served as the sole arbitrator on a matter in which Mike Levin represented one of the sides.
>
> Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. The parties agreed to Grodin, Lussier, and Goldstein serving on the arbitration panel.
>
> 8. Over one year after Mr. Grodin' s initial disclosure, the arbitration hearing was held on May 3, 4, 5, 6, 7, 12, 14, and 21, 2004. On the first day of the arbitration hearing, Chief Arbitrator Grodin made the following disclosure:
>
> > As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the

[1] RDC does not challenge the findings of fact. It does, however, challenge the application of the facts to the law.

> attorneys did not know the arbitrators. So long as the litigants understand that, we have no problem proceeding.

No party objected to the panel serving after this disclosure was made.

9. Closing arguments were made on May 21, 2004. After the arbitration hearing concluded and as the participants were exiting the arbitration room towards the elevator, Chief Arbitrator Grodin said to Attorney Levin, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Attorney Levin apologized that he had not yet had an opportunity to review the contract but told the Chief Arbitrator that he would review the contract on the plane. The court accepts Mr. Grodin's testimony regarding this conversation as credible. This conversation took place publicly between the Chief Arbitrator and Attorney Levin in a manner so that others present could hear them speaking to each other. This was not a secretive conversation "overheard" by Attorney Cecchi.

10. The parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel on June 18, 2004. The panel of arbitrators, Grodin, Lussier, and Goldstein, declared the arbitration hearing closed on July 7, 2004.

11. The panel of arbitrators, Grodin, Lussier, and Goldstein, unanimously issued the Interim Arbitration Award on August 6, 2004. In the Interim Arbitration Award, the panel of three arbitrators, among other things, found that RDC mismanaged Heathrow Golf and that the Heathrow Golf and Country Club suffered from RDC's lack of professional business management. The panel of three arbitrators expelled RDC as the general partner of Heathrow Golf. Apostolicas' claim for dam-

ages against RDC was denied. RDC's counterclaim that Apostolicas' development and marketing of Red Tail Golf and Country Club was a breach of a general fiduciary obligation of loyalty to Heathrow Golf was denied.

12. Three days later, on Monday, August 9, 2004, RDC filed its Petition to Vacate with the court, seeking to have the court vacate the Interim Arbitration Award that was issued in favor of Apostolicas.

13. RDC's Petition to Vacate raised the following objections to the Interim Arbitration Award in favor of Apostolicas: The arbitrators exceeded their powers and the Chief Arbitrator demonstrated evident partiality.

14. Regarding Chief Arbitrator Grodin's relationship with Attorney Levin, the Petition to Vacate, in relevant part, states as follows:

> Upon information, the Chief Arbitrator, James Grodin, has a professional relationship with Apostolicas' counsel, Michael Levin that was not properly disclosed to RDC or its Counsel. During the hearing, RDC overheard conversations suggesting that the Messrs. Grodin and Levin either represented the same person recently, or were working together on the same matter involving a Rabbi and Synagogue at the very same time the arbitration was pending. This relationship was never disclosed.

15. The conversation referenced in the Petition to Vacate between Chief Arbitrator Grodin and Attorney Levin was heard by RDC's counsel, James E. Cecchi, on May 21, 2004. Attorney Cecchi heard this conversation and took no action regarding the conversation until after RDC received the adverse award on August 6, 2004.

16. On August 11, 2004, RDC's counsel wrote to the AAA and provided the AAA with a copy of the Petition to Vacate filed on August 9, 2004, in circuit court and requested a full disclosure by Chief Arbitrator Grodin of his entire relationship with Attorney Levin.

17. On August 27, 2004, the parties received Chief Arbitrator Grodin's supplemental disclosure which stated, in relevant part, as follows:

> I drafted our Rabbi's employment contract for a Synagogue committee, which is negotiating it with Mr. Levin who serves as the Rabbi's representative. I advised the committee at the outset that I would not and could not have any contact with Mr. Levin on this matter.

* * *

37. Because there are no allegations of actual conflict or bias in this case, to vacate an arbitration award on the theory that undisclosed facts establish "evident partiality," RDC must show that the undisclosed circumstances would reasonably tend to bias the judgment of Chief Arbitrator Grodin. *See Deen v. Oster, supra; Boyhan v. Maguire, supra.* In this case, the undisclosed facts do not show circumstances which would reasonably tend to bias the judgment of Chief Arbitrator Grodin in favor of Michael Levin or his client, Apostolicas.

38. On January 31, 2003, Mr. Grodin made his initial disclosure that he and Attorney Levin were members of the same Synagogue. Approximately one year later, unbeknown to RDC, Messrs. Grodin and Levin's Synagogue, the COS [Congregation Ohev Shalom], decided to renew its engagement contract with its Rabbi. In February of 2004, the Executive Board of COS held a meeting and appointed Bill Sholk and Jim Grodin to negotiate the Rabbi's new employment contract. [FN]

Bill Sholk was present at this meeting. Jim Grodin was not. When Bill Sholk called Jim Grodin about the Rabbi's new contract, Jim Grodin told Bill Sholk that he would not work with Michael Levin because of this pending arbitration and that Bill Sholk would have to negotiate the contract for the Synagogue. It is clear from the evidence that Bill Sholk agreed to negotiate the turns of the contract for the Synagogue and that Jim Grodin agreed to draft the contract.

[FN] The Rabbi has an existing four year employment contract with COS that ends in August of 2005. Jim Grodin drafted this contract and the Rabbi's earlier contract with COS dating back to 1995. COS wanted to negotiate a new contract with the Rabbi before the existing contract expired.

39. The Court accepts the testimony of Bill Sholk as credible. The term sheets for the Rabbi's contract were negotiated by Bill Sholk and Michael Levin from March to April of 2004. Bill Sholk was not set up as a "Middle-man," as argued by RDC but, in fact, served as the negotiator on behalf of the Synagogue. Jim Grodin provided legal counsel to Bill Sholk and drafted the Rabbi's contract on behalf of the Synagogue. Jim Grodin prepared all of the drafts of the Rabbi's contract.

40. Jim Grodin was not a decision-maker with respect to the Rabbi's new contract. The congregation and Executive Board of COS and the Rabbi were the decision-makers.

41. It is uncontroverted that by April 18, 2004, Bill Sholk and Michael Levin reached complete agreement on all issues regarding the Rabbi's new 15 year . . . contract. On April 18, 2004, the renewal of the Rabbi's contract was taken before the COS at its Annual Meeting and the congregation voted to renew the Rabbi's contract

for 15 years . . . , with the terms as negotiated by Bill Sholk and Michael Levin. The same evening as the COS Annual Meeting, the Executive Board of the COS met and also approved the 15 year . . . contract as presented. After the April 18th meetings, when the business deal was negotiated and agreed upon by the Rabbi, the COS, the COS's Executive Board, the new contract terms were sent by Bill Sholk to Jim Grodin for Jim Grodin to "plug in terms."

42. The first draft of the Rabbi's contract as prepared by Jim Grodin was e-mailed to Bill Sholk on April 27, 2004. This draft was forwarded by Bill Sholk to Michael Levin on April 29, 2004. The April 27th contract was complete and included all of the negotiated terms. On April 27, Bill Sholk e-mailed Michael Levin and told him that this contract was going to be taken to the Board on April 28th at a special meeting for the sole purpose of the congregation formally agreeing on the contract. Bill Sholk ended this e-mail to Michael Levin by stating as follows, "We will get the blessing tomorrow night and after you look at and approve the contract, both sides can sign and put this to bed."

43. The arbitration hearing in this case began several days later on May 3, 2004, and concluded on May 21, 2004. It was on May 21, 2004, at the end of the arbitration hearing as everyone was leaving that Chief Arbitrator Jim Grodin generally said to Michael Levin in the presence of, at least, Attorney Cecchi, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Michael Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator he would review the contract on the plane.

44. On June 11, 2004, Michael Levin began contract negotiations again by raising severance and disability

issues. Disability became a contentious issue between Bill Sholk and Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and "obnoxious" e-mails. The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment from June 1 1 th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other.

* * *

46. On June 16, 2004, Jim Grodin called Michael Levin on the telephone to tell him to "cut the crap," come up with a new suggestion and that the contract was going nowhere, that he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS. The court accepts Jim Grodin' s testimony regarding this telephone conversation with Michael Levin as credible. Jim Grodin and Michael Levin did not discuss the substantive terms of the current Rabbi's contract renewal during this telephone call. The evidence establishes that Jim Grodin and Michael Levin did not discuss the pending arbitration during this telephone call.

47. On June 18, 2004, the parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel.

48. From July 2 through July 8, 2004, the disability and severance issues were resolved. Severance was not a contentious issue and was not included in the Rabbi's

contract. Disability was a contentious issue between Bill Sholk and Michael Levin. Bill Sholk sought counsel from Jim Grodin on how to deal with Michael Levin during this time frame. Ultimately, Bill Sholk and Michael Levin reached agreement on the disability issue on July 8, 2004.

49. On July 7, 2004, the Arbitration Panel declared the arbitration closed.

50. From July 8, 2004, until August 9, 2004, Michael Levin had no contact with anyone regarding the Rabbi's contract, except the Rabbi.

51. On August 6, 2004, the three-member Arbitration Panel issued the Interim Arbitration Award.

* * *

56. Florida requires that "evident partiality" be found only where a reasonable person would conclude that the undisclosed circumstances would tend to bias the judgment of a neutral arbitrator. The alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative. A reasonable person looking at the undisclosed circumstances in the instant case would conclude that Jim Grodin's involvement with the renewal of the Rabbi's engagement contract and relationship with Michael Levin would not "tend to bias his judgment" in the arbitration proceeding.

57. RDC argues that Jim Grodin's undisclosed involvement with the Rabbi's engagement contract renewal requires vacatur because it was: (a) concurrent with the arbitration; (b) fraught with numerous opportunities for ex-parte contact and favoritism; and (c) material as to time, value and relationship.

58. The Rabbi's contract renewal did occur during the parties' arbitration proceeding. The Rabbi's contract renewal began in early 2004 and ended on September 9, 2004, when the Synagogue and Rabbi signed the new engagement contract. The parties' arbitration began on October 2, 2002, and ended with the rendition of the Final Arbitration Award on October 25, 2004. Clearly, the undisclosed relationship between Jim Grodin and Michael Levin occurred during the arbitration proceedings, including the arbitration hearing, deliberation and rendition of the Arbitration Award.

59. While Jim Grodin' s undisclosed relationship with Michael Levin was concurrent with the arbitration proceedings, this relationship was not a substantial relationship. There were no ex-parte communication between Jim Grodin and Michael Levin regarding the subject matter of the arbitration proceeding. The arbitration was mentioned in the Rabbi's contract renewal one time in an e-mail from Michael Levin to Bill Sholk dated June 11, 2004 which stated, in relevant part, as follows: "I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations." This e-mail was also copied to Burt Chasnov, Jim Grodin and Jeff Bornstein by Michael Levin. The arbitration was also mentioned by Jim Grodin to Bill Sholk at the beginning of the contract renewal process as the reason that Jim Grodin would not negotiate the Rabbi's new contract with Michael Levin.

60. RDC correctly argues that the Rabbi's contract that was renewed for 15 years . . . was a material contract. While this clearly was a material contract for

the COS and the Rabbi, this material contract did not create a substantial relationship between Jim Grodin and Michael Levin. Both attorneys were volunteering their time and their talents to help their Synagogue renew its contract with its Rabbi. Jim Grodin already had previous COS engagement contracts on his computer because he had produced several other employment contracts on behalf of the COS for this Rabbi and other rabbis and cantors.

61. By the time Jim Grodin became involved with the instant contract renewal, both the congregation of COS and its Executive Board had already voted to approve a 15 year . . . engagement contract for its Rabbi and these material terms were never an issue. While the disability issue was also a material issue, a contentious issue and an issue with which Jim Grodin had some involvement, it is uncontroverted that the disability issue could not have been a deal breaker. Bill Sholk testified that the Rabbi was staying, that one item would not be a deal breaker, and that they just needed to reach an agreement. The court accepts this testimony as credible and assigns little weight to the fact that the disability issue became a contentious issue for a period of time during the June 11th-18th and July 2nd-8th negotiations and to the fact that Jim Grodin had some involvement with the disability issue or any of the contract issues. The Rabbi's written engagement contract was going to be finalized, it was just a matter of when. The COS had already voted to keep their Rabbi for fifteen years, until the Rabbi retired. The length and salary had already been agreed upon by both the COS and the Rabbi. The terms of the contract, even material ones, were going to be worked out because the congregation wanted this Rabbi as their Rabbi until he retired. This was volunteer Synagogue work and Jim Grodin wanted to expeditiously finalize the Rabbi's new engagement contract.

62. Michael Levin did not do anything in the Rabbi's contract renewal that curried favor with Jim Grodin in the arbitration proceeding: There were no real life opportunities for a "quid pro quo" created by the undisclosed circumstances in this case. The "Thanks Mike" e-mail from Jim Grodin to Michael Levin on June 16, 2004, for making a different proposal on the disability issue proposal is not evidence that Michael Levin had curried favor with Jim Grodin in the arbitration proceeding. A review of Jim Grodin's relationship with Michael Levin in the Rabbi's contract renewal would not lead a reasonable person to believe that a potential conflict exists in the arbitration proceeding.

63. RDC argues that former Chief Arbitrator Grodin's nondisclosure was designed to conceal his relationship with Attorney Levin. The court disagrees. The court notes that Jim Grodin made a general disclosure that he and Michael Levin were members of the same Synagogue. There is no evidence to establish that the Chief Arbitrator's nondisclosure in this case was calculated to conceal his involvement in the Rabbi's contract renewal. The court bases this conclusion in part on the fact that Chief Arbitrator Grodin spoke openly to Attorney Levin in front of, at least, Attorney Cecchi about the Rabbi's contract renewal. This is not conduct consistent with a plan to conceal Jim Grodin's involvement with the Rabbi's contract renewal. The court concludes from all the evidence that former Chief Arbitrator Grodin did not disclose his involvement in the Rabbi's contract renewal because he thought his involvement was trivial.

64. A reasonable person, considering all the undisclosed evidence in this case, would not conclude that Jim Grodin's involvement with Michael Levin in the Rabbi's contract renewal would tend to bias his judgment in

favor of Apostolicas or Michael Levin in the arbitration proceeding. RDC has not established that the undisclosed facts in this case "might create an impression of possible bias" towards Apostolicas or Michael Levin in the arbitration proceeding. There is no "evident partiality" in this case.

65. The evidence establishes that Chief Arbitrator Grodin drafted the Rabbi's contract on behalf of the Synagogue and served as the attorney for the Synagogue and that Bill Sholk negotiated the terms of the contract on behalf of the Synagogue. Michael Levin represented the Rabbi in the contract negotiations. The drafting and negotiation of the Rabbi's contract occurred concurrent with the arbitration proceedings, including the arbitration hearing and deliberations. RDC was unaware of the roles Messrs. Grodin and Levin played in the renewal of the Rabbi's contract until RDC filed its Petition to Vacate the Interim Arbitration Award.

* * *

67. The court concludes that Chief Arbitrator Grodin should have fully disclosed his involvement with Michael Levin in the renewal of the Rabbi's engagement contract. The Chief Arbitrator did not do so in a timely manner during the arbitration proceeding.

68. As stated by the Fourth District in *Weinger v. State Farm Fire & Casualty*, 620 So.2d 1298, 1299 (Fla. 4th DCA 1993), "It is now clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias." The *Weinger* court continued, "Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award." Id. [sic]. While the undisclosed circumstances in this case do not rise to the

> level of "might create an impression of possible bias," Chief Arbitrator Grodin should have fully disclosed them anyways [sic]. For the reasons stated in this order, former Chief Arbitrator Grodin's non-disclosure does not warrant vacating the Final Arbitration Award.

(Most internal footnotes omitted).

DISCUSSION

RDC argues that it did not have the benefit of an impartial arbitration panel because during critical phases of the arbitration proceeding, Chief Arbitrator Grodin and Apostolicas's counsel, Levin, were both involved in a material contract transaction. RDC claims that Grodin and Levin failed to disclose, actively concealed, and then misrepresented the existence and extent of their relationship with respect to the contract transaction. RDC further asserts that this relationship "might create an impression of possible bias" to a reasonable party in the position of RDC and Heathrow, and, consequently, the arbitration award should be vacated.

STANDARD OF REVIEW

A high degree of conclusiveness attaches to an arbitration award. *Deen v. Oster*, 814 So.2d 1065, 1068 (Fla. 4th DCA 2001); *see Charbonneau v. Morse Operations, Inc.*, 727 So.2d 1017, 1019 (Fla. 4th DCA 1999). To vacate an arbitration award, a party must establish one of the five statutory grounds set forth in section 682.13(1)(a)-(e), Florida Statutes (2004). *See Commo'ns Workers of Am. v. Indian River County Sch. Bd.*, 888 So.2d 96, 99 (Fla. 4th DCA 2004). When the party moving to vacate fails to prove one of the five statutory grounds, "neither a circuit court nor a district court of appeal has the authority to overturn the award." *Schnurmacher Holding, Inc. v. Noriega*, 542 So.2d 1327, 1328 (Fla.1989). Appellate review of orders granting or denying a motion to vacate an arbitration award are governed by "the same standards as in any ordinary case, whereby

findings of fact are reviewed under a competent and substantial evidence standard and legal questions are reviewed de novo." *See Boyhan v. Maguire*, 693 So.2d 659, 662 (Fla. 4th DCA 1997); *see also Noriega* (explaining that in reviewing an arbitration award, the reviewing court may not comb the record of the arbitration hearing for errors of fact or law inherent in the decision-making process).

EVIDENT PARTIALITY

Both Florida and federal law hold that evident partiality is a basis to vacate an arbitration award. § 682.13(1)(b), Fla. Stat. (2004); 9 U.S.C. § 10(a)(2). Because Florida's arbitration statute is modeled after the Federal Arbitration Act, federal decisions are highly persuasive. *See Seretta Constr., Inc. v. Great Am. Ins. Co.*, 869 So.2d 676, 679 (Fla. 5th DCA 2004). However, while decisions of federal courts are persuasive, we are bound only by decisions of the United States Supreme Court. *See Mora v. Abraham Chevrolet-Tampa, Inc.*, 913 So.2d 32, 35 (Fla. 2d DCA 2005); *Raymond James Fin. Servs., Inc. v. Saldukas*, 851 So.2d 853, 856 (Fla. 2d DCA 2003).

Here, the trial court determined that Grodin should have fully disclosed his involvement with Levin in the contract proceedings. Nevertheless, the trial court confirmed the arbitration award based on its conclusion that the undisclosed circumstances did not create an impression of possible bias. RDC argues that the trial court applied the wrong legal standard, erroneously relying on *Lifecare International, Inc. v. CD Medical, Inc.*, 68 F.3d 429, 432 (11th Cir.1995), which held that the "mere appearance of bias or partiality is not enough to set aside an arbitration award." RDC contends that the standard established in *Lifecare* conflicts with the more recent Eleventh Circuit case of *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir.2002), as well as Florida law set forth in *Weinger v.*

State Farm Fire & Casualty Co., 620 So.2d 1298, 1299 (Fla. 4th DCA 1993).

A. Florida Law

Section 682.13(1)(b), Florida Statutes (2004), provides that a "court shall vacate an award when . . ." "'[t]here was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party.'" *Deen*, 814 So.2d at 1068; *see Int'l Ins. Co. v. Schrager*, 593 So.2d 1196, 1197 (Fla. 4th DCA 1992); *see also Weinger*, 620 So.2d at 1299 (holding that in arbitration cases, "it is clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias"). However, an arbitration award may only be set aside upon the "showing of circumstances which would reasonably tend to bias the judgment of an impartial arbitrator." *Boyhan*, 693 So.2d at 662.

B. Federal Law

The Federal Arbitration Act likewise authorizes the court to vacate an arbitration award "where there was evident partiality . . . in the arbitrators, or either of them." 9 U.S.C. § 10(a)(2). However, "evident partiality, like obscenity, is an elusive concept: one knows it when one sees it, but it is awfully difficult to define in exact terms. No jurist has yet coined an exacting legal standard for 'evident partiality,' although many have tried." *Cont'l Ins. Co. v. Williams*, No. 84-2646-CIV-MARCUS, 1986 WL 20915, *3-4 (S.D.Fla. Sept.17, 1986) (citations omitted). The definitional difficulties of "evident partiality" notwithstanding, it is settled that the evident partiality inquiry is a case-specific and fact-intensive one. *See Lifecare*, 68 F.3d at 435 (stating that the question of evident partiality is "fact intensive" and "highly dependant on the unique factual settings of each particular case").

The leading United States Supreme Court case concerning claims of arbitral evident partiality is *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 89 S.Ct. 337, 21 L.Ed.2d 301 (1968). Thus, any inquiry must begin there. In *Commonwealth Coatings*, the United States Supreme Court addressed the circumstances under which 9 U.S.C. § 10(a)(2) authorizes the vacation of an arbitration award for failure to disclose the existence of a close financial relationship between a neutral arbitrator and a party to the arbitration. 393 U.S. at 146-48, 89 S.Ct. 337. In that case, one arbitrator of a three-arbitrator panel failed to inform the plaintiff that the defendant had been a sporadic customer of the arbitrator's business, and that the relationship went so far as to include the rendering of services on the very projects involved in the arbitration. After the arbitration panel made a unanimous decision in favor of the defendant, the plaintiff learned of the business relationship between the arbitrator and the defendant and challenged the award on the basis that the arbitrator's failure to disclose his prior business relationship resulted in "evident partiality," thereby, warranting a vacation of the award. The Supreme Court held that the arbitrator's failure to disclose these facts justified vacation of the arbitration award, noting that it is not only actual bias, but the *appearance of bias* that must be excluded from judicial and arbitral forums. *Id.* at 146-50, 89 S.Ct. 337.

In delivering the Court's opinion[2] in *Commonwealth Coatings*, Justice Black wrote:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the single requirement that *arbitrators disclose to the parties any dealings that might create an impression of possible bias*.

Id. at 149-50, 89 S.Ct. 337 (emphasis supplied). To us, it appears that the Supreme Court in *Commonwealth Coatings* envisioned that an arbitrator's award could be challenged on the basis of bias, when the challenging party presented facts

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[2] Whether *Commonwealth Coatings* is a plurality opinion or a majority opinion is an open question. Most courts, including the Eleventh Circuit, have concluded that *Commonwealth Coatings* is a plurality opinion. *See, e.g., Middlesex Mut. Ins. Co. v. Levine*, 675 F.2d 1197 (11th Cir.1982); *Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 429 F.3d 640 (6th Cir.2005); *Apperson v. Fleet Carrier Corp.*, 879 F.2d 1344, 1358 n. 19 (6th Cir.1989); *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681-82 (7th Cir.1983); *Austin South I, Ltd. v. Barton-Malow Co.*, 799 F.Supp. 1135, 1141 (M.D.Fla.1992) (stating that *Commonwealth Coatings* is a plurality opinion, and, therefore, the Court's holding may be viewed as that position taken by those members who concurred in the judgments on the narrowest grounds). Other courts have found to the contrary. *See, e.g., Positive Software Solutions, Inc. v. New Century Mortg. Corp.*, 436 F.3d 495 (5th Cir.2006); *Schmitz v. Zilveti*, 20 F.3d 1043, 1045 (9th Cir.1994) (stating that *Commonwealth Coatings* is not a plurality opinion because Justice White joined in the majority opinion although he wrote "additional remarks").

that, viewed reasonably, gave rise to an "impression of possible bias." 393 U.S. at 149-50, 89 S.Ct. 337.

Following *Commonwealth Coatings*, the interpretation of what has come to be referred to as the "reasonable impression of partiality" standard has varied somewhat among the different federal courts considering it.[3] The Eleventh Circuit has said that an arbitration award may be vacated due to the "evident partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose, information that would lead a reasonable person to believe that a potential conflict exists. *Univ. Commons-Urbana Ltd.*, 304 F.3d at 1339; *Middlesex Mut. Ins. Co.*, 675 F.2d 1197, 1202 (11th Cir.1982). The party challenging the arbitration award must demonstrate that the undisclosed information creates a "reasonable impression of partiality," *Lifecare*, 68 F.3d at 433 (citation omitted), or put another way, "information which would lead a reasonable person to believe that a potential conflict exists." *Gianelli Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.1998) . The alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain, and speculative." *Id.; see Scott v. Prudential Sec., Inc.*, 141 F.3d 1007, 1015 (11th Cir.1998) (holding that "to vacate an arbitration award for evident partiality, the moving party must present evidence that would support a 'reasonable impression of partiality' on the arbitrator's behalf . . . [t]he assertion of partiality, however,

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[3] Several courts have remarked on the muddled state of the law concerning evident partiality, due in part to this decision. *See Morelite Constr. Corp.*, 748 F.2d at 82-84; *Merit Ins. Co.*, 714 F.2d at 681-82; *see also Burlington N. R.R. v. TUCO*, 960 S.W.2d 629, 634 (Tex.1997) (commenting on the two conflicting standards that the federal courts have adopted in wake of *Commonwealth Coatings*).

must be 'direct, definite and capable of demonstration rather than remote, uncertain and speculative'").[4]

Whether these conditions have been met ordinarily requires a fact-intensive inquiry. *Lifecare*, 68 F.3d at 435. In general, "the mere appearance of bias or partiality is not enough to set aside an arbitration award." *Id.* at 433 (citing *Consol. Coal Co. v. Local 1643, United Mine Workers of Am.*, 48 F.3d 125, 129 (4th Cir.1995)). If, however, the moving party can show that an arbitrator failed to disclose a substantial relationship between himself and a party, then the less demanding "appearance of bias" standard applies. *Park v. First Union Brokerage Servs., Inc.*, 926 F.Supp. 1085, 1088 (M.D.Fla. 1996) (citing *Commonwealth Coatings*, 393 U.S. at 151-52, 89 S.Ct. 337 (White, J., concurring)).

Other courts have reached similar conclusions, i.e., that the party challenging the arbitration award is required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias. *See, e.g., Nationwide Mut. Ins. Co. v. Home Ins. Co.*, 278 F.3d 621, 626 (6th Cir.2002) ("The alleged partiality must be direct, definite, and capable of demonstration, and the party asserting evident partiality must establish specific facts that indicate improper motives on the

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[4] The burden of proof with regard to claims of evident partiality and arbitrator misconduct or misbehavior prejudicing the rights of a party rests with the party raising such allegations. That burden is substantial, extending beyond the mere appearance of impropriety to something approximating clear and convincing evidence of material wrongdoing. Thus, in the absence of substantial, direct proof that one or more of the types of misconduct addressed in section 10(a)(2) of the Federal Arbitration Act has transpired, coupled with a demonstrated link between that the untoward behavior and the challenged arbitral result, the prospects for the vacation of the arbitration award are doubtful. Stephen L. Hayford, *Law in Disarray: Judicial Standards for Vacatur of Commercial Arbitration Awards*, 30 GALR 731, 748-49 (1996) (internal citations omitted).

part of the arbitrator."); *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 991 F.2d 141, 146 (4th Cir.1993) (stating that the alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative); *Employers Ins. of Wausau v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 933 F.2d 1481, 1489 (9th Cir.1991) (a party "must demonstrate more than a mere appearance of bias to disqualify an arbitrator"); *Washburn v. McManus*, 895 F.Supp. 392, 398 (D.Conn.1994) (stating that there must be more than mere appearance of bias to vacate arbitrator's award); *Health Servs. Mgmt. Corp. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992) (determining that evident partiality within the meaning of subsection (a) of the FAA means more than the mere appearance of bias; to set aside an award for arbitration partiality, the interest or bias must be direct, definite, and capable of demonstration rather than remote, uncertain, or speculative); *Waverlee Homes, Inc. v. McMichael*, 855 So.2d 493 (Ala.2003) (holding that under "reasonable impression of partiality standard," party challenging arbitration award was required to present admissible, credible evidence that created an impression of bias that is direct, definite, and capable of demonstration, rather than a mere appearance of a remote, uncertain, and speculative bias); *see also Consol. Coal Co.*, 48 F.3d at 129 (determining that to demonstrate evident partiality under the FAA, the party seeking vacation has burden of proving that a reasonable person would have to conclude that the arbitrator was partial to the other party to the arbitration, and the reasonable person standard requires a showing of more than the appearance of bias); *Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir.1984) (holding that " 'evident partiality' within the meaning of 9 U.S.C. § 10 will be found where a reasonable person would have to conclude that an arbitrator was partial to one party to the arbitration"); *Metro. Prop. & Cas. Ins. Co. v. J.C. Penney Cas. Ins. Co.*, 780 F.Supp. 885, 891

(D.Conn.1991) (stating that the party alleging impropriety "must establish facts that create a reasonable impression of bias or misconduct") (citations omitted).

We conclude that the weight of authority developed after *Commonwealth Coatings* requires a review of the evidence utilizing the "reasonable impression of partiality" standard. As such, we find that the trial court properly weighed RDC's allegations of Grodin's evident partiality by considering whether RDC made a showing through credible evidence, giving rise to a "reasonable impression of partiality" that was "direct, definite, and capable of demonstration," as distinct from a "mere appearance" of bias that was remote, uncertain, and speculative.

C. Application of the Prevailing Law

Commonwealth Coatings does not establish a per se rule requiring vacatur of an award whenever an undisclosed relationship is discovered. *See Lucent Techs. Inc. v. Tatung Co.*, 379 F.3d 24, 30 (2d Cir.2004).[5] Instead, only dealings that "might create an impression of possible bias" must be disclosed. *Lifecare*, 68 F.3d at 433; *Weinger*, 620 So.2d at 1299. This does not require arbitrators to provide the parties

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[5] RDC relies on cases from other jurisdictions that contravene the rule adopted in Florida and the Eleventh Circuit. *See, e.g., Henry v. Halliburton Energy Servs.*, 100 S.W.3d 505, 509 (Tex.App.2003) (finding that the evident partiality is established from the *nondisclosure itself*; regardless of whether the nondisclosed information necessarily establishes partiality or bias); *Valrose Maui, Inc. v. Maclyn Morris, Inc.*, 105 F.Supp.2d 1118 (D.Hawai'i 2000) (concluding that the mere appearance of bias created by even good faith ex parte communications was sufficient to show "evident partiality"); *Kern v. 303 East 57th Street Corp.*, 204 A.D.2d 152, 611 N.Y.S.2d 547 (1994) (holding that the appearance of impropriety or partiality is sufficient to warrant vacature of an arbitration award; it is only necessary to demonstrate the potential for bias to find misconduct). Because these cases are not consistent with the standard articulated by Florida courts and the Eleventh Circuit, they are not controlling.

with a "complete and unexpurgated business biography." *Commonwealth Coatings*, 393 U.S. at 151, 89 S.Ct. 337 (White, J., concurring). "Whether ties are so indirect or remote that they could not reasonably create an impression of bias is a question that must be answered by reference to the facts of the particular case." *Sanko S.S. Co. v. Cook Indus., Inc.*, 495 F.2d 1260, 1264 n. 3 (2d Cir.1973).

As the trial court determined, Grodin should have disclosed his involvement with Levin in the renewal of the Rabbi's employment contract. Nevertheless, as the trial court found, it does not appear that Grodin's non-disclosure created a *reasonable* impression of partiality, thereby, warranting the vacation of the final arbitration award. There was no evidence that Levin did, or could have done anything in the negotiations of the Rabbi's contract renewal to curry favor with Grodin in the arbitration proceedings, or that Grodin's contact with Levin regarding the Rabbi's contract renewal was substantial. Although Grodin and Levin's relationship did exist at the same time as the arbitration proceeding, Grodin had no financial interest in the Rabbi's contract. The trial court's findings, supported by substantial, competent evidence, establish that the Rabbi's contract was substantially negotiated between Levin and Bill Sholk between February 2004 and April 2004, before the arbitration was heard. While the disability issue arose during the course of the arbitration proceedings, it was not an essential term, and it was only on this issue that there was any contact between Grodin and Levin. This limited contact falls short of evidence demonstrating that Levin curried favor with Grodin in the arbitration proceeding.

Further, contrary to RDC's assertion, it does not appear that Grodin's non-disclosure was designed to conceal his relationship with Levin. Grodin made a general disclosure that he and Levin were members of the same synagogue. Grodin also spoke openly to Levin about the Rabbi's contract

renewal in the presence of RDC's attorney. As the trial court concluded, this is not conduct that is consistent with a plan to conceal.

Here, RDC asks this Court to conclude that because Grodin failed to disclose his involvement with Levin in the renewal of the Rabbi's employment contract, the arbitration award should be vacated. We cannot reach that conclusion. The facts of this case do not show bias or partiality that is direct, definite, and capable of demonstration. *Lifecare*, 68 F.3d at 433; *see Local 530, AFSCME, Council 15 v. City of New Haven*, 9 Conn.App. 260, 518 A.2d 941, 947 (1986) (holding that even under the "appearance of bias" standard, that appearance must be reasonable; "[t]he mere speculative statement of bias by a participant in the arbitration proceeding does not in and of itself justify a claim of disqualification").

Because we conclude that the trial judge's findings of fact are supported by competent, substantial evidence, and that the correct rule of law was applied, we affirm.

AFFIRMED.

APPENDIX B

SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 21, 2006

CASE NO.: SCO6-913
Lower Tribunal No.: 5D05-2597

RDC GOLF OF FLORIDA I, INC., ETC., *et al.*
Petitioner,

vs.

GEORGE P.APOSTOLICAS,
Respondent.

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution, and the Court having determined that it should decline to accept jurisdiction, it is ordered that the petition for review is denied.

No motion for rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

The motion for attorneys' fees is granted and it is ordered that respondent shall recover from petitioner the amount of $2,500.00 for the services of respondents attorney's in this Court.

PARIENTE, QUINCE, CANTERO and BELL, JJ., concur.

LEWIS, C.J., dissents.

A True Copy
Test:

/s/ Thomas D. Hall [seal]
THOMAS D. HALL
Clerk, Supreme Court

mc
Served:

HON. SUSAN WRIGHT, CLERK
JAMES E. CECCHI
MICHAEL R. LEVIN
HON. DONNA L. MCINTOSH, JUDGE
HON. MARYANNE MORSE, CLERK
JOHN M. BRENNAN
RICHARD E. MITCHELL
JOHN R. BERANEK
MAJOR B. HARDING

APPENDIX C

IN THE CIRCUIT COURT OF THE
EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR SEMINOLE COUNTY, FLORIDA

CASE NO. 04-CA-1740-16-G CONSOLIDATED

RDC GOLF OF FLORIDA I, INC., a Florida Corporation, and
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Petitioners,

vs.

GEORGE P. APOSTOLICAS, Individually and Derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondents.

CASE NO. 04-CA-2315-16-G

GEORGE P. APOSTOLICAS, Individually and Derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Petitioners,

vs.

RDC GOLF OF FLORIDA I, INC., a Florida Corporation, and
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondents.

ORDER CONFIRMING FINAL ARBITRATION AWARD

THIS CAUSE came for final hearing on May 4, 5, and 6, 2005 upon RDC Golf of Florida I, Inc.'s Amended Petition to Vacate Arbitration Award, filed September 24, 2004, and

Counter-Petition to Vacate Interim and Final Arbitration Awards filed November 15, 2004, and George P. Apostolicas' Petition for Confirmation of the Final Arbitration Award, filed November 2, 2004. The court, after having considered the parties' respective petitions, evidence, arguments, and memoranda of law, hereby makes the following findings of fact and conclusions of law:

BACKGROUND

1. The Heathrow Golf Company Limited Partnership ("Heathrow Golf") was formed to own and operate the Heathrow Golf and Country Club located in Heathrow, Florida. The Limited Partnership Agreement sets out the rights, responsibilities and obligations of the general partner and limited partners. The Limited Partnership Agreement provided for arbitration of disputes between the parties to the Agreement.

2. The Ronald A. Schiavone Living Trust ("Schiavone Trust") and George P. Apostolicas ("Apostolicas") are the limited partners in Heathrow Golf. Ronald A. Schiavone is the sole trustee of the Schiavone Trust. RDC Golf of Florida I, Inc. ("RDC") is the general partner of Heathrow Golf. Christopher R. Schiavone, Ronald A. Schiavone's son, is the principal of RDC.

3. On October 2, 2002, Apostolicas filed a derivative and individual complaint with the American Arbitration Association ("AAA"), asserting that RDC, as the general partner of Heathrow Golf, damaged Heathrow Golf by RDC's mismanagement and breach of its duties and responsibilities to the partnership. Apostolicas sought the expulsion of RDC as the general partner and damages.

4. ROC denied the complaint and counterclaimed asserting that Apostolicas interfered with RDC' s management of the Heathrow Golf and Country Club and that Apostolicas breached his general fiduciary duty to Heathrow Golf by

participating in the development and marketing of Red Tail Golf and Country Club in Lake County, Florida.

5. The attoneys representing RDC were James E. Cecchi of Carella, Byrne, Bain, et al. and John M. Brennan of GrayRobinson, P.A. The attorneys representing Apostolicas were Michael R. Levin and Leslie Bissinger of Baker & Hostetler, LLP.

6. The case was set for Arbitration before Arbitrators James Grodin, James R. Lussier, and Joseph I. Goldstein. James Grodin was selected as the Chief Arbitrator,

7. On January 31, 2003, Mr. Grodin made the following initial disclosure regarding Apostolicas' counsel, Michael Levin:

> I have known Mike Levin for over ten years. He and I have been on opposite sides of a case. He has represented religious organizations on whose board I served where I advocated his retention to represent the organization in litigation matters, His family and mine belong to the same Synagogue, and when I was Synagogue president, his wife served on the Executive Committee and Board over which I presided. I served as a sole arbitrator on a matter in which Mike Levin represented one of the parties.

Neither party objected to Mr. Grodin serving as arbitrator after receiving this disclosure. The parties agreed to Grodin, Lussier, and Goldstein serving on the arbitration panel.

8. Over one year after Mr. Grodin' s initial disclosure, the arbitration hearing was held on May 3, 4, 5, 6, 7, 12, 14, and 21, 2004. On the first day of the arbitration hearing, Chief Arbitrator Grodin made the following disclosure:

> As I stated off the record, the arbitrators and the attorneys here know each other. And my guess is that we wouldn't have been picked as arbitrators if the attorneys

> had not known the arbitrators. So long as the litigants understand that, we have no problem proceeding.

No party objected to the panel serving after this disclosure was made.

9. Closing arguments were made on May 21, 2004. After the arbitration hearing concluded and as the participants were exiting the arbitration room towards the elevators, Chief Arbitrator Grodin said to Attorney Levin, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Attorney Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator that he would review the contract on the plane.[1] The court accepts Mr. Grodin's testimony regarding this conversation as credible. This conversation took place publicly between the Chief Arbitrator and Attorney Levin in a manner so that others present could hear them speaking to each other, This was not a secretive conversation "overheard" by Attorney Cecchi.

10. The parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel on June 18, 2004. The panel of arbitrators, Grodin, Lussier, and Goldstein, declared the arbitration hearing closed on July 7, 2004.

11. The panel of arbitrators, Grodin, Lussier, and Goldstein, unanimously issued the Interim Arbitration Award on August 6, 2004. In the Interim Arbitration Award, the panel of three arbitrators, among other things, found that RDC mismanaged Heathrow Golf and that the Heathrow Golf and Country Club suffered from RDC's lack of professional business management. The panel of three arbitrators expelled RDC as the general partner of Heathrow Golf. Apostolicas'

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[1] Michael Levin and his family were flying to England on May 25, 2004 for a vacation. This family vacation had been made known to the arbitration panel and parties for scheduling purposes.

claim for damages against RDC was denied. RDC's counterclaim that Apostolicas' development and marketing of Red Tail Golf and Country Club was a breach of a general fiduciary obligation of loyalty to Heathrow Golf was denied. Apostolicas was determined to be the prevailing party in the arbitration for purposes of recovering fees and costs.

12. Three days later, on Monday, August 9, 2004, RDC filed its Petition to Vacate with the court, seeking to have the court vacate the Interim Arbitration Award that was issued in favor of Apostolicas.[2]

13. RDC's Petition to Vacate raised the following objections to the Interim Arbitration Award in favor of Apostolicas: The arbitrators exceeded their powers and the Chief Arbitrator demonstrated evident partiality.

14. Regarding Chief Arbitrator Grodin's relationship with Attorney Levin, the Petition to Vacate, in relevant part, states as follows:

> Upon information, the Chief Arbitrator, James Grodin, has a professional relationship with Apostolicas' counsel, Michael Levin that was not properly disclosed to RDC or its Counsel. During the hearing, RDC overheard conversations suggesting that the Messrs. Grodin and Levin either represented the same person recently, or were working together on the same matter involving a Rabbi and Synagogue at the very same time the arbitration was pending. This relationship was never disclosed.

15. The conversation referenced in the Petition to Vacate between Chief Arbitrator Grodin and Attorney Levin was heard by RDC's counsel, James E. Cecchi, on May 21, 2004.

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[2] According to *Air Conditioning Equipment, Inc. v. Rogers*, 551 So. 2d 554, 557 (Fla. 4th DCA 1989), once the parties agreed to submit to arbitration, the Florida Arbitration Code limits the authority of the court to interfere in the process prematurely.

Attorney Cecchi heard this conversation and took no action regarding the conversation until after RDC received the adverse award on August 8, 2004.

16. On August 11, 2004, RDC's counsel wrote to the AAA and provided the AAA with a copy of the Petition to Vacate filed on August 9, 2004, in circuit court and requested a full disclosure by Chief Arbitrator Grodin of his entire relationship with Attorney Levin.

17. On August 27, 2004, the parties received Chief Arbitrator Grodin's supplemental disclosure which stated, in relevant part, as follows:

> I drafted our Rabbi's employment contract for a Synagogue committee, which is negotiating it with Mr. Levin who serves as the Rabbi's representative. I advised the committee at the outset that I would not and could not have any contact with Mr. Levin on this matter.

18. After receipt of Chief Arbitrator Grodin's supplemental disclosure, both parties presented their respective client's positions by letter to the AAA regarding Mr. Grodin's continued service on the arbitration panel. RDC objected to Chief Arbitrator Grodin's continued service on the panel. Apostolicas did not object to Chief Arbitrator Grodin's continued service on the panel.

19. On September 17, 2004, the AAA reaffirmed Mr. Grodin as an arbitrator in the matter.

20. On October 11, 2004, the AAA advised the parties that Chief Arbitrator Grodin had resigned as arbitrator in the matter and that Arbitrators Lussier and Goldstein would continue with the arbitration process pursuant to the Arbitration Order dated September 21, 2004.

21. On October 25, 2004, the remaining two arbitrators, James R. Lussier and Joseph L. Goldstein, rendered the Final

Arbitration Award. The remaining two arbitrators reaffirmed the entire Interim Arbitration Award with the exception of the last three sentences, which were vacated, The modified Interim Arbitration Award was incorporated in the Final Arbitration Award by reference and declared to be the Final Arbitration Award in the matter. Apostolicas, individually and derivatively of Heathrow Golf, was reaffirmed as the prevailing party in the arbitration. RDC was held solely responsible for payment of all administrative fees and expenses of AAA and the arbitrators. The Final Arbitration Award was a full settlement of all claims submitted to arbitration.

22. RDC filed its Petition to Vacate on August 9, 2004 in Case No. 1740. Apostolicas filed a Petition for Confirmation of the Final Arbitration Award on November 2, 2004 in Case No. 2315. These cases were consolidated by order entered February 8, 2005 and were set for trial for May 4, 5, and 6, 2005. Because there was a legitimate disputed factual issue concerning the adequacy of the Chief Arbitrator's disclosure, the court allowed discovery on that issue. At trial, the court bifurcated proceedings on the issue of fees and costs and on the issue of a receivership pending ruling on the issues presented for trial.

23. RDC requests that the court vacate the Interim and Final Arbitration Award because of the evident partiality of former Chief Arbitrator Grodin. RDC does not allege actual bias or partiality on the part of former Chief Arbitrator Grodin. No objections have been filed against the majority panel members, James R. Lussier and Joseph I. Goldstein.

THE LAW

24. In Florida, arbitration is a favored means of dispute resolution and courts should indulge every reasonable presumption to uphold proceedings resulting in an award. *Roe v. Amica Mut. Ins. Co.*, 533 So. 2d 279, 281 (Fla. 1988).

However, the Florida Arbitration Code, chapter 682, provides several bases upon which a court may vacate an award. The statutory specified grounds enumerated in the Florida Arbitration Code are the sole grounds upon which an arbitration award can be vacated. *State Dept of Insurance v. First Floridian Auto and Home Ins. Co.*, 803 So. 2d 771 (Fla. 1st DCA 2001); *Verzura Const, Inc. v. Surfside Ocean, Inc.*, 708 So. 2d 994 (Fla. 3d DCA 1998). Section 682.13(1)(b), Florida Statutes (2004), requires vacatur of an arbitration award where "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party."[3] "Evident partiality" is a basis for vacation only in the case of a neutral arbitrator. *Lee v. Marcus*, 396 So. 2d 208, 209 (Fla. 3d DCA 1981).

25. As pointed out by the court in *Continental Insurance Co. v.Williams*, 1986 WL 20915 (S.D. Fla. 1986) (Not reported in Federal Supplement), "No jurist has yet coined an exacting legal standard for 'evident partiality', although many have tried." An "evident partiality" inquiry is by its very nature case-specific and fact-intensive. See *Lifecare Intern., Inc. v. CD Medical, Inc.*, 68 F.3d 429, 435 (11th Cir. 1995) (question is "fact intensive" and "highly dependent on the unique factual settings of each particular case").

26. The seminal case in this area is the Supreme Court's decision in *Commonwealth Coatings Corp. v. Continental Cas. Co.*, 393 U.S. 145 (1968), which involved the question of whether elementary requirements of impartiality taken for granted in every judicial proceeding are suspended when the parties agree to resolve a dispute through arbitration. In *Commonwealth Coatings*, the Supreme Court set aside the arbitration award for evident partiality where the arbitration

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[3] The court treats Chief Arbitrator James Grodin as "an arbitrator appointed as a neutral."

did not disclose his close financial relations with a contractor that had existed for many years. *Id.* at 148-149. These close business connections were not made known to the losing party to the arbitration until after an award had been entered. Justice Black, writing for a plurality of the Court, stated:

> It is true that arbitrators cannot sever all their ties with the business world, since they are not expected to get all their income from their work deciding cases, but we should, if anything, be even more scrupulous to safeguard the impartiality of arbitrators than judges, since the former have completely free rein to decide the law as well as the facts and are not subject to appellate review. We can perceive no way in which the effectiveness of the arbitration process will be hampered by the simple requirement that arbitrators disclose to the parties any dealings that might create an impression of possible bias. *Id.*

Justice White, in a concurring opinion, stated:

> The Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges. it is often because they are men of affairs, not apart from but of the marketplace, that they are effective in their adjudicatory function . . . This . . . means that arbitrators are not automatically disqualified by a business relationship with the parties before them if both parties are informed of the relationship in advance, or if they are unaware of the facts but the relationship is trivial,
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> * * *
>
> Of course, an arbitrator's business relationships may be diverse indeed, involving more or less remote commercial connections with great numbers of people. He cannot be expected to provide the parties with his complete and unexpurgated business biography. But it is

> enough for present purposes to hold, as the Court does, that where the arbitrator has a substantial interest in a firm which has done more than trivial business with a party, that fact must be disclosed. If arbitrators err on the side of disclosure, as they should, it will not be difficult for courts to identify those undisclosed relationships which are too insubstantial to warrant vacating an award. Id. at 150-152.

27. In *Lifecare Intern. Inc. v. CD Medical, Inc.*, 68 F.2d 429, 432 (11th Cir. 1995), the Eleventh Circuit stated the test for evident partiality in nondisclosure cases as follows:

> In order to vacate on the ground of evident partiality in a nondisclosure case, the party challenging the arbitration award must establish that the undisclosed facts create a "reasonable impression of partiality." *Middlesex Mut. Ins, Co. v Levine*, 675 F.2d 1197, 1201 (11th Cir.1982); *Schmitz v. Zilverti*, 20 F.3d 1043, 1048 (9th Cir.1994). The Court has reasoned that the alleged partiality must be "direct, definite and capable of demonstration rather than remote, uncertain and speculative." *Levine*, 675 F.2d at 1201; *accord, Consol. Coal v. Local 1643, United Mine Workers*, 48 F.3d 125, 129 (4th Cir. 1 995); *Health Services Management Corn. v. Hughes*, 975 F.2d 1253, 1264 (7th Cir.1992). Accordingly. the mere appearance of bias or partiality is not enough to set aside an arbitration award. *Consol. Coal*, 48 F.3d at 129; *Health Services Management Corp.*, 975 F.2d at 1264; *Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 173 (2d Cir.1984); *see Schmitz*, 20 F.Sd at 104647 (rejecting "appearance of bias" standard). (Emphasis added).

28. Most recently in *University Commons-Urbana Ltd. v. Universal Constructors, Inc.*, 304 F.3d 1331, 1339 (11th Cir. 2002), the Eleventh Circuit ruled as follows:

> an arbitration award may be vacated due to the "evident

> partiality" of an arbitrator only when either (1) an actual conflict exists, or (2) the arbitrator knows of, but fails to disclose information which would lead a reasonable person to believe that a potential conflict exits. Gianaeili *Money Purchase Plan & Trust v. ADM Investor Servs., Inc.*, 146 F.3d 1309, 1312 (11th Cir.1998) (citing *Lifecare Int'l, Inc. v. CD Med., Inc.*, 68 F.3d 429, 433 (11th Cir. 1995) and *Middlesex Mut. Ins. Co., v. Levine*, 675 F.2d 1197, 1202 (11th Cir.1982).

29. In *Deen v. Oster*, 814 So. 2d 1065, 1068 (Fla. 4th DCA 2001), the Fourth District defined when evident partiality by an arbitrator appointed as a neutral requires vacatur:

> However, the Florida Arbitration Code, chapter 682, provides for several bases upon which a court can vacate an award. One is if "there was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or umpire or misconduct prejudicing the rights of any party." § 682.13(1)(b), Fla. Stat. (2000). This section requires an arbitrator to avoid even the appearance of partiality. *See Intl Ins. Co. v. Schrager*, 593 So.2d 1196, 1197 (Fla. 4th DCA 1992). Therefore, an arbitration award must be set aside upon the "showing of circumstances which would reasonably tend to bias the judgment of an impartial arbitrator." *Boyhan v. Maguire* 693 So.2d 659, 662 (Fla. 4th DCA 1997).

WAIVER

30. Apostolicas argues that RDC waived its objection to any conflict or bias on the part of former Chief Arbitrator Grodin. The court does not agree.

31. The Chief Arbitrator's initial disclosure that he and Attorney Levin belonged to the same Synagogue did not reasonably put RDC on notice that they would be volunteering to work on the renewal of Rabbi Rubinger's ("Rabbi") engagement contract at their Synagogue, the Congregation

Obey Shalom ("COS"), during the arbitration proceeding, nor was it designed to do so. Chief Arbitrator Grodin's initial disclosure took place approximately one year before the COS began the Rabbi's contract renewal.

32. The disclosure made by the Chief Arbitrator on the first day of the arbitration hearing, May 3, 2004, that the arbitrators and attorneys know each other, did not put RDC on notice of the role played by the Chief Arbitrator and Attorney Levin in the Rabbi's contract renewal, nor was it designed to do so. On May 3rd, Chief Arbitrator Grodin, along with everyone else involved with the Rabbi's contract renewal, thought the Rabbi's contract renewal was a "done deal."

33. The brief conversation that Attorney Cecchi heard between the Chief Arbitrator and Attorney Levin on May 21, 2004, was the first time that RDC had any kind of notice of the Rabbi's contract renewal.

34. Apostolicas argues that when Attorney Cecchi heard the May 21st conversation, RDC was put on notice that the Chief Arbitrator and Attorney Levin were somehow involved with a rabbi's contract. Apostolicas argues that RDC should be foreclosed from now objecting about this issue because RDC did not timely raise this issue with the AAA, and did not timely inquire further into the details of the Chief Arbitrator's relationship with Attorney Levin after hearing the conversation, until RDC received the unfavorable Interim Arbitration Award on August 9, 2004. The court cannot agree, although the only event that occurred between the time that RDC heard the May 21st conversation and the filing of RDC's Petition to Vacate on August 9, 2004, was RDC's receipt of the unfavorable Interim Arbitration Award on August 6, 2004.

35. Waiver is the intentional or voluntary relinquishment of a known right. *Costello v. The Curtis Building Partnership.*

864 So. 2d 1241, 1244 (Fla. 5th DCA 2004). In this case, the *May 21st conversation did not provide RDC with actual* knowledge of the facts surrounding the Rabbi's contract renewal, nor provide RDC with enough information to trigger a responsibility on the part of RDC to perform its own investigation or inquire further of the AAA. RDC should have been able to rely on the disclosures made by the Chief Arbitrator.

36. The information heard by RDC in the May 21st conversation between Chief Arbitrator Grodin and Attorney Levin was insufficient information to give rise to a waiver of an objection arising out of that information. RDC has not waived its objection to former Chief Arbitrator Grodin.

EVIDENT PARTIALITY

37. Because there are no allegations of actual conflict or bias in this case, to vacate an arbitration award on the theory that undisclosed facts establish 'evident partiality," RDC must show that the undisclosed circumstances would reasonably tend to bias the judgment of Chief Arbitrator Grodin. See *Deen v. Oster*, supra; *Boyhan v. Maguire*, supra. In this case, the undisclosed facts do not show circumstances which would reasonably tend to bias the judgment of Chief Arbitrator Grodin in favor of Michael Levin or his client, Apostolicas.

38. On January 31, 2003, Mr. Grodin made his initial disclosure that he and Attorney Levin were members of the same Synagogue. Approximately one year later, unbeknown to RDC, Messrs. Grodin and Levin's Synagogue, the COS, decided to renew its engagement contract with its Rabbi. In February of 2004, the Executive Board of COS held a meeting and appointed Bill Sholk[4] and Jim Grodin[5] to

[4] Bill Sholk is a mortgage broker and served as President of the Executive Board of COS during the 1996/1997 time frame.

negotiate the Rabbi's new employment contract,[6] Bill Sholk was present at this meeting: Jim Grodin was not, When Bill Sholk called Jim Grodin about the Rabbi's new contract, Jim Grodin told Bill Sholk that he would not work with Michael Levin because of this pending arbitration and that Bill Sholk would have to negotiate the contract for the Synagogue, It is clear from the evidence that Bill Sholk agreed to negotiate the terms of the contract for the Synagogue and that Jim Grodin agreed to draft the contract.

39. The court accepts the testimony of Bill Sholk as credible. The term sheets for the Rabbi's contract were negotiated by Bill Sholk and Michael Levin from March to April of 2004. Bill Sholk was not set up as a "middle-man," as argued by RDC but, in fact, served as the negotiator on behalf of the Synagogue. Jim Grodin provided legal counsel to Bill Sholk and drafted the Rabbi's contract on behalf of the Synagogue. Jim Grodin prepared all the drafts of the Rabbi's contract.

40. Jim Grodin was not a decision-maker with respect to the Rabbi's new contract. The congregation and Executive Board of COS and the Rabbi were the decision-makers.

41. It is uncontroverted that by April 18, 2004. Bill Sholk and Michael Levin reached complete agreement on all issues regarding the Rabbi's new 15 year/3 million dollar contract. On April 18, 2004, the renewal of the Rabbi's contract was taken before the COS at its Annual Meeting and the con-

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[5] Jim Grodin, an attorney with Foley and Lardner, has been a member of COS since 1988. As a past president of the COS, Sim Grodin remained a member of the Executive Board of 005, but has not been active with the Executive Board, nor attended any Board meetings, since 2002.

[6] The Rabbi has an existing four year employmeat contract with 00$ that ends in August of 2005. Jim Grodin drafted this contract and the Rabbis earlier contract with COS dating back to 1995. COS wanted to negotiate a new contract with the Rabbi before the existing contact expired.

gregation voted to renew the Rabbi's contract for 15 years/3 million dollars, with the terms as negotiated by Bill Sholk and Michael Levin, The same evening as the COS Annual Meeting, the Executive Board of the COS met and also approved the 15 year/3 million dollar contract as presented. After the April 18th meetings, when the business deal was negotiated and agreed upon by the Rabbi, the COS, and COS's Executive Board, the new contract terms were sent by Bill Sholk to Jim Grodin for Jim Grodin to "plug in terms."

42. The first draft of the Rabbi's contract as prepared by Jim Grodin was emailed to Bill Sholk on April 27, 2004. This draft was forwarded by Bill Sholk to Michael Levin on April 29, 2004. The April 27th contract was complete and included all of the negotiated terms. On April 27, Bill Sholk e-mailed Michael Levin and told him that this contract was going to be taken to the Board on April 27th at a special meeting for the sole purpose of the congregation formally agreeing on the contract. Bill Sholk ended this e-mail to Michael Levin by stating as follows, "We will get the blessing tomorrow night and after you look at and approve the contract, both sides can sign and put this to bed."

43. The arbitration hearing in this case began several days later on May 3, 2004, and concluded on May 21, 2004. It was on May 21, 2004, at the end of the arbitration hearing as everyone was leaving that Chief Arbitrator Jim Grodin generally said to Michael Levin in the presence of, at least, Attorney Cecchi, "When you review the Rabbi's contract, please look at the footnotes because I may have made a mistake in the footnotes." Michael Levin apologized that he had not yet had an opportunity to review the contract, but told the Chief Arbitrator he would review the contract on the plane.

44. On June 11, 2004, Michael Levin began contract negotiations again by raising severance and disability issues. Disability became a contentious issue between Bill Sholk and

Michael Levin for two reasons: (1) Bill Sholk thought Michael Levin was trying to change their previous agreement which had already been voted on and approved by the COS and (2) Bill Sholk was irritated by Michael Levin's strident and 'obnoxious" e-mails. The e-mails produced by Jim Grodin reveal that Jim Grodin and Michael Levin were directly and indirectly receiving and sending e-mails regarding the Rabbi's employment contract from June 11th to June 18th and from July 2nd to July 8th. The direct e-mails between Jim Grodin and Michael Levin occurred because Bill Sholk and Michael Levin began "sparking" with each other.

45. The key e-mails between June 11 and June 18, 2004, are summarized as follows:

06/11/04 E-mail from Michael Levin to Bill Sholk, cc: Rabbi, B, Yarmuth, Burt Chasnov, J. Bornstein, Jim Grodin. (I have been immersed in an arbitration immediately followed by a family trip to England . . . Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Burt Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations.)

06/14/04 E-mail from Bill Sholk to Michael Levin (The changes that were made to the disability section . . . They are material to the contract and were agreed upon by both sides. We are now re-negotiating the contract which has been voted on and approved by the executive board and board . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (. . . We are not re-negotiating and simply trying to document the deal made. You are equally wrong about . . .)

06/14/04 E-mail from Michael Levin to Bill Sholk (I also would point out that it is not productive to make accusations of "re-negotiating" . . . Let's get this put to bed.)

06/14/04 E-mail from Bill Sholk to Burt Chasnov, cc: Jim Grodin, J. Bornstein Subject: another salvo fired from Levin.

06/14/04 E-mail from James Grodin to Michael Levin, Subject: Discretionary Fund (Mike—I have been following the emails. Here is the problem . . . . This is really a bit of a tempest in a teapot. . . .)

06/15/04 E-mail from Jim Grodin to Michael Levin (As my kids used to say, my tummy is getting tired.)[7]

06/16/04 E-mail from Michael Levin to Bill Sholk (You are fundamentally wrong . . .)

6/16/04 E-mail from Michael Levin to Bill Sholk (Bill, attached is an e-mail that I received this morning from the Rabbi. He has asked me to share the email with you and your team)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (Call me on my cell. Jim)

6/16/04 E-mail from Michael Levin to Jim Grodin, Subject: Some Synagogue History you need to know (I left a message on your cell. My cell is 321-439-4863. I am meeting Judy for lunch at 1 but otherwise can be reached on the cell all day.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Subject: Some Synagogue History you need to know (I'll call when I finish my meeting.)

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[7] Jim Grodin's oldest son (now a doctor) used to say this as a young child when he was frustrated.

6/16/04 E-mail from Michael Levin to Bill Sholk, cc: Burt Chasnov, Jim Grodin, J. Bornstein, Rabbi, B. Yarmuth (Hello, all. Following conversations with Jim Grodin and Rabbi Rubinger this afternoon; I am working on a new proposal on the disability issue that I hope to present sometime later this evening. Jim, I will write it so that it can be dropped into the draft contract if acceptable to all.)

6/16/04 E-mail from Jim Grodin to Michael Levin, Bill Sholk cc: Burt Chasnov, J. Bornstein, Rabbi, B. Yarmuth (Thanks Mike)

6/17/04 E-mail from Michael Levin to Bill Sholk, Jim Grodin, B. Chasnov, J. Bornstein. (Rabbi and I worked late last night on a new proposal on the disability issue. I am waiting for his final comments and hope to get it to you by mid-morning . . .)

6/17/04 E-mail from Michael Levin to Bill Sholk, J. Grodin, B. Chasnov, J. Bornstein, Subject: Attached is a proposed compromise on the disability provision. Please let me know your comments.

06/18/04 E-mail from Michael Levin to Jim Grodin, Bill Sholk. (I was just wondering if there is any response to our proposal on the disability issue . . .)

6/18/04 E-mail from Jim Grodin to Michael Levin (I am out of the loop on the negotiating end. You have to check with Bill.)

46. , On June 16, 2004, Jim Grodin called Michael Levin on the telephone to tell him to "cut the crap," come up with a new suggestion and that the contract was going nowhere, that

he needed to be positive, and to explain to Michael Levin the history behind the language in an earlier rabbi's contract with COS. The court accepts Jim Grodin's testimony regarding this telephone conversation with Michael Levin as credible. Jim Grodin and Michael Levin did not discuss the substantive terms of the current Rabbi's contract renewal during this telephone call. The evidence establishes that Jim Grodin and Michael Levin did not discuss the pending arbitration during this telephone call.

47. On June 18, 2004, the parties submitted their proposed Memorandum of Arbitration Decision to the Arbitration Panel.

48. From July 2 through July 8, 2004, the disability and severance issues were resolved. Severance was not a contentious issue and was not included in the Rabbi's contract. Disability was a contentious issue between Bill Sholk and Michael Levin. Bill Sholk sought counsel from Jim Grodin on how to deal with Michael Levin during this time frame. Ultimately, Bill Sholk and Michael Levin reached agreement on the disability issue on July 8, 2004.

49. On July 7, 2004, the Arbitration Panel declared the arbitration closed.

50. From July 8, 2004, until August 9, 2004, Michael Levin had no contact with anyone regarding the Rabbi's contract, except the Rabbi.

51. On August 6, 2004, the three-member Arbitration Panel issued the Interim Arbitration Award.

52. On August 9, 2004, Bill Sholk e-mailed Jim Grodin and stated that "Michael Levin just wanted to know when we thought we would have a contract for him to look at?"

53. On August 9, 2004, the Petition to Vacate was filed in circuit court by RDC.

54. On September 9,2004, the Rabbi's contract was signed.

55. On October 11, 2004, Jim Grodin resigned as arbitrator, On October 25, 2004, the majority panel of Arbitrators, Lussier and Goldstein, reaffirmed the Interim Award, except for the last three sentences, and rendered the Final Arbitration Award.

56. Florida requires that "evident partiality" be found only where a reasonable person would conclude that the undisclosed circumstances would tend to bias the judgment of a neutral arbitrator. The alleged partiality must be direct, definite, and capable of demonstration rather than remote, uncertain, and speculative. A reasonable person looking at the undisclosed circumstances in the instant case would conclude that Jim Grodin's involvement with the renewal of the Rabbi's engagement contract and relationship with Michael Levin would not "tend to bias his judgment" in the arbitration proceeding.

57. RDC argues that Jim Grodin's undisclosed involvement with the Rabbi's engagement contract renewal requires vacatur because it was: (a) concurrent with the arbitration: (b) fraught with numerous opportunities for ex-parte contact and favoritism; and (c) material as to time, value and relationship.

58. The Rabbi's contract renewal did occur during the parties' arbitration proceeding. The Rabbi's contract renewal began in early 2004 and ended on September 9, 2004, when the Synagogue and Rabbi signed the new engagement contract. The parties' arbitration began on October 2, 2002, and ended with the rendition of the Final Arbitration Award on October 25, 2004. Clearly, the undisclosed relationship between Jim Grodin and Michael Levin occurred during the arbitration proceedings, including the arbitration hearing, deliberation and rendition of the Arbitration Award.

59. While Jim Grodin's undisclosed relationship with Michael Levin was concurrent with the arbitration proceedings, this relationship was not a substantial relationship.

There were no exparte communication between Jim Grodin and Michael Levin regarding the subject matter of the arbitration proceeding. The arbitration was mentioned in the Rabbi's contract renewal one time in an e-mail from Michael Levin to Bill Sholk dated June 11. 2004 which stated, in relevant part, as follows: "I have been immersed in an arbitration immediately followed by a family trip to England... Because of the delay and the possibility that you are now on vacation, I am taking the liberty of forwarding this draft to Bud Chasnov, Jim Grodin and Jeff Bornstein, all of whom I understand to be involved on your side of the negotiations." This e-mail was also copied to Burt Chasnov, Jim Grodin and Jeff Bornstein by Michael Levin. The arbitration was also mentioned by Jim Grodin to Bill Sholk at the beginning of the contract renewal process as the reason that Jim Grodin would not negotiate the Rabbi's new contract with Michael Levin.

60. RDC correctly argues that the Rabbi's contract that was renewed for 15 years and 3 million dollars was a material contract. While this clearly was a material contract for the COS and the Rabbi, this material contract did not create a substantial relationship between Jim Grodin and Michael Levin. Both attorneys were volunteering their time and their talents to help their Synagogue renew its contract with its Rabbi. Jim Grodin already had previous COS engagement contracts on his computer because he had produced several other employment contracts on behalf of the COS for this Rabbi and other rabbis and cantors.

61. By the time Jim Grodin became involved with the instant contract renewal, both the congregation of COS and its Executive Board had already voted to approve a 15 year/3 million dollar engagement contract for its Rabbi and these material terms were never an issue. While the disability issue was also a material issue, a contentious issue and an issue with which Jim Grodin had some involvement, it is uncon-

troverted that the disability issue could not have been a deal breaker. Bill Sholk testified that the Rabbi was staying, that one item would not be a deal breaker, and that they just needed to reach an agreement. The court accepts this testimony as credible and assigns little weight to the fact that the disability issue became a contentious issue for a period of time during the June 11th-18th and July 2nd-8th negotiations and to the fact that Jim Grodin had some involvement with the disability issue or any of the contract issues. The Rabbi's written engagement contract was going to be finalized, it was lust a matter of when. The COS had already voted to keep their Rabbi for fifteen years, until the Rabbi retired. The length and salary had already been agreed upon by both the COS and the Rabbi. The terms of the contract, even material ones, were going to be worked out because the congregation wanted this Rabbi as their Rabbi until he retired. This was volunteer Synagogue work and Jim Grodin wanted to expeditiously finalize the Rabbi's new engagement contract.

62. Michael Levin did not do anything in the Rabbi's contract renewal that curried favor with Jim Grodin in the arbitration proceeding. There were no real life opportunities for a "quid pro quo" created by the undisclosed circumstances in this case. The "Thanks Mike" e-mail from Jim Grodin to Michael Levin on June 16, 2004, for making a different proposal on the disability issue proposal is not evidence that Michael Levin had curried favor with Jim Grodin in the arbitration proceeding. A review of Jim Grodin's relationship with Michael Levin in the Rabbi's contract renewal would not lead a reasonable person to believe that a potential conflict exists in the arbitration proceeding.

63. RDC argues that former Chief Arbitrator Grodin's non-disclosure was designed to conceal his relationship with Attorney Levin. The court disagrees. The court notes that Jim Grodin made a general disclosure that he and Michael Levin were members of the same Synagogue. There is no evidence

to establish that the Chief Arbitrator's non-disclosure in this case was calculated to conceal his involvement in the Rabbi's contract renewal. The court bases this conclusion in part on the fact that Chief Arbitrator Grodin spoke openly to Attorney Levin in front of, at least, Attorney Cecchi about the Rabbi's contract renewal. This is not conduct consistent with a plan to conceal Jim Grodin's involvement with the Rabbi's contract renewal. The court concludes from all the evidence that former Chief Arbitrator Grodin did not disclose his involvement in the Rabbi's contract renewal because he thought his involvement was trivial.

64. A reasonable person, considering all the undisclosed evidence in this case, would not conclude that Jim Grodin's involvement with Michael Levin in the Rabbi's contract renewal would tend to bias his judgment in favor of Apostolicas or Michael Levin in the arbitration proceeding. RDC has not established that the undisclosed facts in this case "might create an impression of possible bias" towards Apostolicas or Michael Levin in the arbitration proceeding. There is no "evident partiality" in this case.

DISCLOSURE

65. The evidence establishes that Chief Arbitrator Grodin drafted the Rabbi's contract on behalf of the Synagogue and served as the attorney for the Synagogue and that Bill Sholk negotiated the terms of the contract on behalf of the Synagogue. Michael Levin represented the Rabbi In the contract negotiations. The drafting and negotiation of the Rabbi's contract occurred concurrent with the arbitration proceedings, including the arbitration hearing and deliberations. RDC was unaware of the roles Messrs. Grodin and Levin played in the renewal of the Rabbi's contract until RDC filed its Petition to Vacate the Interim Arbitration Award.

66. Canon II of the AAA Code of Ethics for Arbitrators in Commercial Disputes provides that an arbitrator should disclose any interest or relationship likely to affect impartiality or which might create an appearance of partiality. Any doubt as to whether or not disclosure is to be made should be resolved in favor of full disclosure. Rule 19 of the AAA Commercial Arbitration Rules provides as follows:

> Any person appointed as a neutral arbitrator shall disclose to the AAA any circumstances likely to affect impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.

Rule 16 of the AbA Commercial Arbitration Rules governs disclosure. Rule 16(a) provides as follows:

> Any person appointed or to be appointed as an arbitrator shall disclose to the MA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration.

67. The court concludes that Chief Arbitrator Grodin should have fully disclosed his involvement with Michael Levin in the renewal of the Rabbi's engagement contract. The Chief Arbitrator did not do so in a timely manner during the arbitration proceeding.

68. As stated by the Fourth District in *Weinger v. State Farm Fire & Casualty*, 620 So. 2d 1298, 1299 (Fla. 4th DCA

1993), "It is now very clear that an arbitrator has an affirmative duty to disclose any dealings that might create an impression of possible bias." The *Weinger* court continued, "Failure to disclose such an association undermines the appearance of propriety and the confidence of the fairness of the proceedings and requires the vacation of the award." Id. While the undisclosed circumstances in this case do not rise to the level of "might create an impression of possible bias," Chief Arbitrator Grodin should have fully disclosed them anyways. For the reasons stated in this Order, former Chief Arbitrator Grodin's non-disclosure does not warrant vacating the Final Arbitration Award.

VACANCY CREATED BY
RESIGNATION OF CHIEF ARBITRATOR

69. On October 11, 2004, the AAA advised the parties that Chief Arbitrator Grodin had resigned as arbitrator in the matter and that Arbitrators, Lussier and Goldstein would continue with the arbitration process pursuant to the Arbitration Order dated September21, 2004.

70. Former Chief Arbitrator Grodin did not sign the Final Arbitration Award that RDC asks this court to vacate. Chief Arbitrator Grodin resigned as an arbitrator after the arbitration hearing was held and the Interim Arbitration Award was rendered. Noting that the Chief Arbitrator had resigned, the majority panel of Arbitrators, Lussier and Goldstein, issued the Final Arbitration Award after the majority panel reaffirmed the interim Arbitration Award, except for the last three sentences thereof. Therefore, former Chief Arbitrator Grodin played no role in the rendition of the Final Arbitration Award. RDC has not objected to Arbitrator Lussier or Goldstein.

71. All of the cases argued by RDC to support its Petition to Vacate address vacatur of a final arbitration award due to the evident partiality of an arbitrator that took part in the

final arbitration award. We do not have that factual situation in this case.

72. The arbitration in this case was conducted pursuant to the Florida Arbitration Code. Section 682.05, Florida Statutes, reads as follows:

> 682.05 Majority action by arbitrators,—The powers of the arbitrators may be exercised by a majority of their number unless otherwise provided in the agreement or provision for arbitration.

73. Additionally, Section 682.06(3), Florida Statutes, governs the hearings as follows:

> 682.06 Hearing.—Unless otherwise provided by the agreement or provision for arbitration:
>
> * * *
>
> (3) The hearing shall be conducted by all of the arbitrators but a majority may determine any question and render a final award, An umpire authorized to hear and decide the cause upon the failure of the arbitrators to agree upon an award shall sit with the arbitrators throughout their hearing but shall not be counted as a part of their quorum or in the making of their award. If, during the course of the hearing, an arbitrator for any reason ceases to act, the remaining arbitrator, arbitrators or umpire appointed to act as neutrals may continue with the hearing and determination of the controversy.

74. In this case, there was no evidence that the parties had an agreement or provision for arbitration that required all three arbitrators to render the final award or that required unanimity. in the absence of such an arbitration agreement or provision, a majority of the arbitrators are authorized to re-affirm an interim award and enter a final award.

75. Where a dispute concerning the disposition of a security deposit made by a lessee under a lease agreement was

submitted to arbitrators and the arbitrator selected by the lessee resigned prior to entry of the award, it was held in *Cassara v. Wofford*, 55 So. 2d 102 (Fla. 1951), that this resignation did not, per se, invalidate the award made by the remaining arbitrators. The Florida Supreme Court in *Cassara* stated that, "One arbitrator, or a minority of arbitrators, cannot, after a dispute has been fully submitted to a board of arbitration, defeat an award by resigning, withdrawing, or otherwise refusing to participate in the hearings, since under our statute a majority of arbitrators are authorized to enter the award." The court in Cassara further noted that Florida's Arbitration Code has not changed the common-law rule that all arbitrators shall sit at the hearings and hear the evidence. The reason for this rule is that the parties have a right to the presence and the argument, experience, and counsel of each arbitrator during the whole process, so that a minority vacancy occurring after the dispute has been fully submitted to the whole arbitration panel amounts, for all practical purposes, to a dissent by the absent member, and does not terminate the authority of the remaining members of the panel to make a majority award. See *Effect of Vacancy Through Resignation, Withdrawal, or Death of One or Multiple Arbitrators on Authority of Remaining Arbitrators to Render Award*, 49 A.L.R. 2d 900 Art. III, B, §10, 11.

76. In Travelers Indem. Co. v. Walton, 384 So. 2d 939 (Fla. 3rd DCA 1980), the Third District held that where an arbitration award was rendered upon the concurrence of two arbitrators, any error due to the third arbitrator's lack of opportunity to express his vote and join the final award was harmless.

77. In the Instant case, all three arbitrators were present at the hearing, heard all the evidence, deliberated, and rendered the Interim Arbitration Award. After the dispute was fully submitted to the three-member arbitration panel, but before entry of the Final Arbitration Award, Chief Arbitrator Grodin

resigned as arbitrator in the mailer. Therefore, pursuant to the Florida Arbitration Code, the majority Arbitrators, Lussier and Goldstein, were authorized to render the Final Arbitration Award,

Based on the above, the court ORDERS and ADJUDGES as follows:

1. RDC'S Amended Petition to Vacate Arbitration Award and Counter-Petition to Vacate interim and Final Arbitration Awards are DENIED.

2. Apostolicas' Petition for Confirmation at the Final Arbitration Award is GRANTED. The Final Arbitration Award is CONFIRMED.

3. The court declined to hear Apostolicas' request to appoint a receiver time that an order was rendered on the parties' petitions. Either party may re-notice the receivership issue for hearing before the Honorable James E.C. Perry.

4. The court reserves jurisdiction on the issue of attorneys' fees and costs. Either party may notice this issue for hearing before the Honorable James E.C. Perry.

DONE AND ORDERED in Chambers at Sanford, Seminole County, Florida, this 25th day of June, 2005.

/s/ Donna L. McIntosh
DONNA L. MCINTOSH, Circuit Judge

I HEREBY CERTIFY that true and correct copy of the foregoing has been furnished via U.S. mail this 22nd day of June, 2005, to:

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No. 06-880

IN THE

Supreme Court of the United States

RDC GOLF OF FLORIDA I, INC.,
a Florida Corporation,
Petitioner,

v.

GEORGE P. APOSTOLICAS, individually and derivatively of
HEATHROW GOLF COMPANY LIMITED PARTNERSHIP,
a Florida Limited Partnership,
Respondent.

On Petition for a Writ of Certiorari to the District Court of Appeals of Florida for the Fifth District

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

a) Reason for filing Supplemental Brief

Petitioner RDC Golf of Florida I, Inc. ("RDC") files this Supplemental Brief to advise the Court of the Fifth Circuit's *en banc* decision in *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, which was filed on January 18, 2007, and reported at 2007 WL 111343 (5th Cir. 1/18/07). At the time RDC filed its Petition, the Fifth Circuit had granted rehearing *en banc*, but it had not rendered its decision. (*See* Petition at 23).

b) Issues presented in the Petition

The issue presented in the instant Petition is what is the proper standard to be applied to vacate an arbitration award when an arbitrator fails to disclose a relationship with one of the parties. The Court addressed this issue in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). Since then, two conflicting interpretations of *Commonwealth Coatings* have developed. One line of authority interprets Justice Black's opinion as a majority and applies a broader standard where any undisclosed relationship between an arbitrator and a party which would create an "impression of possible bias" warrants vacating the arbitration award. The other line of authority interprets Justice Black's opinion as a plurality and would vacate an arbitration award only where the undisclosed relationship creates demonstrable bias. The Court should resolve this split of authority as to the standard to be applied when an arbitrator fails to disclose a relationship with one of the parties.

c) The Fifth Circuit's *en banc* decision in *Positive Software* highlights the conflict among the Circuits

In the panel decision, the Fifth Circuit applied the broader standard, holding that "an arbitrator selected by the parties

displays evident partiality by the very failure to disclose facts that might create a reasonable impression of the arbitrator's partiality." *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 436 F.3d 495, 502 (5th Cir. 2006). The *en banc* court, by an 11-5 vote, reversed the panel decision.[1] The *en banc* majority followed the line of cases applying the narrower standard. *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 2007 WL 211343 at 4, slip op. at 11-12. While the *en banc* majority applied a "reasonable impression of partiality" standard, it held that the standard should be "interpreted practically rather than with utmost vigor" and discarded the "might create" emphasis applied by the panel.

The Fifth Circuit's *en banc* opinion is a microcosm of the split of authority among the Circuits and among the states set forth in RDC's Petition.[2] The *en banc* majority interpreted Justice Black's *Commonwealth Coatings* opinion as a plurality, with Justice White's concurring opinion limiting Justice Black's, so that the more narrow standard applicable to non-disclosure cases was the correct one.

> How *Commonwealth Coatings* guides this court is a critical issue. Reasonable minds can agree that *Commonwealth Coatings*, like many plurality-plus Supreme Court decisions, is not pellucid. Justice Black delivered the opinion of the Court and imposed "the simple requirement that arbitrators disclose to the parties any

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[1] We have been advised by Positive Software's counsel that they also intend to seek certiorari from this Court on the same issues presented in RDC's Petition.

[2] The *en banc* decision also resolved conflicts between the state and federal courts in Louisiana and Missippi, but created a conflict in Texas as to the standard to be applied in non-disclosure cases. *Compare In re Arbitration between U.S. Turnkey Exploration, inc. and PSI, Inc.*, 577 So.2d 131, 135 (La.Ct.App. 1991); *Herrin v. Milton M. Stewart, Inc.*, 558 So.2d 863, 865 (Miss. 1990); *Burlington Northern Railroad v. Tuco, Inc.*, 960 S.W.2d 629, 632-636 (Tex. 1997).

dealings that might create an impression of possible bias." [393 U.S.] at 149, 89 S.Ct. at 339. He noted that, while arbitrators are not expected to sever all ties with the business world, courts must be scrupulous in safeguarding the impartiality of arbitrators, who are given the ability to decide both the facts and the law and whose decisions are not subject to appellate review. *Id.* at 148-49, 89 S.Ct. at 339. Thus, arbitrators "not only must be unbiased but also must avoid even the appearance of bias," *Id.* at 150, 89 S.Ct. at 340, in order to maintain confidence in the arbitration system.

Justice White, the fifth vote in the case, together with Justice Marshall, purported to be "glad to join" Justice Black's opinion, but he wrote to make "additional remarks." *Id.* (White, J., concurring). Justice White emphasized that "[t]he Court does not decide today that arbitrators are to be held to the standards of judicial decorum of Article III judges, or indeed of any judges." *Id.* Indeed, Justice White wrote that arbitrators are not "automatically disqualified by a business relationship with the parties before them if . . . [the parties] are unaware of the facts but the relationship is trivial." *Id.* While supporting a policy of disclosure by arbitrators to enhance the selection process, Justice White also concluded, in a practical vein, that an arbitrator "cannot be expected to provide the parties with his complete and unexpurgated business biography." *Id.* at 151, 89 S.Ct. at 340. His opinion fully envisions upholding awards when arbitrators fail to disclose insubstantial relationships. *Id.* at 152, 89 S.Ct. at 341.

If one lays primary emphasis on Justice White's statement that he was "glad to join" the plurality, his opinion can be deemed reconcilable with that of Justice Black. Only in that event is the plurality opinion binding on lower courts.

Another compelling reading of the opinions is also possible, however. Justice Black's opinion uses an egregious set of facts as the vehicle to require broad dis-

> closure of "any dealings that might create an impression of possible bias." *Id.* at 149, 89 S.Ct. at 339. Justice White, for his part, hews closely to the facts and finds it "enough for present purposes to hold, as the Court does, that where the arbitrator has a *substantial interest* in a firm which has done *more than trivial business* with a party, that fact must be disclosed." 393 U.S. at 151-52, 89 S.Ct. at 340-41 (emphasis added). Justice White, thus read, supports ample but not unrealistic disclosure, and he supports a cautious approach to vacatur for non-disclosure. His "joinder" is magnanimous but significantly qualified.
>
> The latter reading is more persuasive, because it accords scope to the full White opinion, unlike the view that focuses on the introductory "glad to join" sentence. Thus, Justice White's concurrence, pivotal to the judgment, is based on a narrower ground than Justice Black's opinion, and it becomes the Court's effective ratio decidendi.

Positive Software, at 2-3; slip op. at 6-8. The *en banc* majority believed that a majority of the Circuits shared this view.[3] *Id.* Summing up, the majority of the *en banc* court held

> As we have concluded, the better interpretation of *Commonwealth Coatings* is that which reads Justice White's opinion holistically. The resulting standard is that in nondisclosure cases, an award may not be vacated because of a trivial or insubstantial prior relationship between the arbitrator and the parties to the proceeding. The "reasonable impression of bias" standard is thus interpreted practically rather than with utmost rigor.

Id. at 4; slip op. at 11-12.

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[3] The Fifth Circuit significantly downplays split among the Circuits on this issue. As is set forth in RDC's Petition, even with the *Positive Software en banc* decision moving the Fifth Circuit among the courts following the narrower standard, there is still nearly an even split among the Circuits and states as to which standard should be applied. (*See* Petition at 23-25).

The dissents, one of which was written by the author of the panel opinion, believed that, contrary to the *en banc* majority, Justice Black's opinion was a majority, not a plurality, opinion and his "impression of possible bias" standard should be applied. *Id.* at 6-12; slip op. at 18-23. Judge Reavley, who wrote the panel decision, read Justice Black's and Justice White's opinions in *Commonwealth Coatings* as being perfectly compatible, so that Justice Black's opinion represented a majority of the Court.

> The *Commonwealth Coatings* opinions of Justice Black (with Warren, Douglas, and Brennan joining) and Justice White (with Marshall joining) are not lengthy. They are easily compared and easily reconciled. Both opinions emphasize the importance of impartiality for those who decide controversy. Justice White distinguishes the role of judges from that of arbitrators in that the arbitrator's relation with a party is immaterial-so long as the other party is informed in advance and makes no objection. And he points out that a trivial relation would not create an impression of possible bias so as to meet the rule stated by Justice Black. Justice White's contribution emphasizes the importance of establishing an atmosphere of frankness at the outset of an arbitration by disclosure when the parties are free to reject the arbitrator or accept him with knowledge of the relationship. I am confident that Justices White and Marshall knew what they were saying when they said they joined Justice Black's opinion, and were not describing it as the majority opinion only to be "magnanimous" as our court now says. Furthermore, it is quite pellucid that six Justices of the Court agreed that, despite the fairness and impartiality of the arbitrator, failure to disclose "any dealings that might create an impression of possible bias" justifies vacatur of the award. The Court did vacate that award only for that reason.

Id. at 6-7; slip op. at 19-20.

Judge Rea[illegible] believed that the two lines of authorities has evolved beca[illegible] some of the Circuits disapprove of the standard set in *Commonwealth Coatings*, and that they, and the *en banc* majority in *Positive Software*, have manufactured the theory that Justice Black's opinion was only a plurality to justify not following his "impression of possible bias" standard. As a majority opinion, the lower courts are obligated to follow Justice Black's *Commonwealth Coatings* opinion, whether they like it or not.

> The majority opinion manages to substitute actual bias, or the reasonable impression of bias, or concrete impression of bias for the Supreme Court's ruling that dealings that might create only an impression of possible bias must be disclosed. And it purports to join other circuits to hold that non-disclosure alone does not require vacatur of an arbitral award. If the circuit courts could overrule the Supreme Court, the majority might be on a bit firmer ground, because the *Commonwealth Coatings* ruling has not been well received by some of the circuit courts.
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> The majority departs from the Supreme Court's ruling by following those courts that have decided that *Commonwealth Coatings* is a plurality or a "plurality-plus" opinion. But the majority opinion, like the opinions on which it relies, do not explain how Justice Black's majority opinion is irreconcilable with Justice White's concurrence. Aside from Justice White's statement that he was glad to join the majority opinion and the substance of his remarks, Justice White did not articulate an alternative rationale. Justice White merely stated what the Court did not hold, which is not inconsistent with the majority opinion.
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> The judicial disfavor of *Commonwealth Coatings*, while receiving surprisingly little treatment, has not gone

> unnoticed by commentators. One observed that "[f]ederal courts have floundered in the wake of *Commonwealth Coatings*" treating Justice White's concurrence as authoritative and standing for a different holding even though Justice White "does not expressly define the standard that should govern arbitrator conduct. His opinion only makes it clear that . . . arbitrators will be governed by a standard less than the standard governing judges." Elizabeth A. Murphy, Note, *Standards of Arbitrator Impartiality: How Impartial Must They Be?*, 1996 J. Disp. ResolL. 463, 470.
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> While I can understand the desire to protect the finality of arbitration awards and avoid a return to extended court expense and delay, this does not justify evading the law of the Supreme Court by misstating it or by avoiding it by bleaching the evidence of possible partiality. Nor should we miss the need to promote the impartiality of arbitrators in this time when that is the favored method of dispute resolution. Influence can so easily corrupt the decision-making process even when it is not recognized by the magistrate or arbitrator himself. And to prove bias or improper influence is rarely possible. It is imperative that we not allow even the good faith or memory of the potential arbitrator to control the disclosure decision for, as the Justices made clear in *Commonwealth Coatings,* it is the protection and reassurance of the party that matters most.

Id. at 7-8, slip op. at 20-23.

Judge Weiner joined Judge Reavley's dissent but also wrote separately to emphasize the importance to the arbitration process of arbitrators' disclosure of any relationships with the parties. Such disclosure is vital because of the different selection process of arbitrators and judges and the surrender of procedural protections by the parties when they choose arbitration over litigation. Because of these differences, Judge Weiner believed that Justice White's remarks about the disqualification of arbitrators because of a prior relationship

with the parties, language that the cases interpreting following the narrower interpretation of *Commonwealth Coatings* have seized upon, dealt with a completely different issue than the relationships an arbitrator should disclose.

> The penumbral point that supervenes this case lies in our recognition of the legal distinction between *disclosure* and *disqualification* in the context of arbitration. Justice White, in his celebrated and thoroughly vetted concurrence in *Commonwealth Coatings Corp.*, "remarked" that the Supreme Court was *not* deciding that "arbitrators are to be held to the *standards of judicial decorum* of Article III judges" or that arbitrators are "automatically *disqualified* by a business relationship" with the parties to arbitration or their counsel. What must be emphasized is that Justice White did *not* "remark" that the differences between the standards of decorum applicable to judges and those to which arbitrators are held has anything at all to do with the immutable prerequisite that, before the parties sign off on a candidate for arbitrator, they must have received from him an unexpurgated disclosure of absolutely every past or present relationship with the parties and their lawyers. That the potential arbitrator himself might deem one or more of such relationships to be so *de minimis* as not to require its divulgence is irrelevant; such culling of information by a candidate must never be allowed to seep interstitially into the *disclosure* calculus. Justice White's remark that *disqualification* is not automatic for minor business relationships is simply inapposite to the requirement of full *disclosure* of every relationship, large and small. This is because, in arbitration, disqualification (more accurately, rejection) is the exclusive province of the parties, each of whom is entitled to make its determination on the basis of total disclosure of relationships, not on the basis of some truncated version that has been cherry-picked by the nominee for the position of arbitrator.

Id. at 10; slip op. at 28-29. (emphasis in original).

Judge Weiner explained that parties choosing to arbitrate their disputes gain speed, informality, cost savings, and a decision maker familiar with the subject matter of the dispute, but give up the rules of evidence, rules of civil procedure and appellate review. Federal judges, who would be the decision makers in litigation, have a rigorous background check with respect to their capabilities, experience and integrity and they serve as decision makers full time. Further, the parties generally have no choice with respect to which judge will decide their case. On the other hand, arbitrators are selected by the parties, based upon information provided to them by the arbitrators themselves. Because of the different selection process in arbitration, the only insurance the parties have against selecting possibly biased arbitrators is full disclosure from the arbitrators of any relationships with the parties, so the parties, not the arbitrators, can decide what relationships are or are not important.

> In exchange for the actual or perceived economies of time, money, expertise and confidentiality, the parties to arbitration alone are responsible for who it is that will decide their fates. Subject to only relatively insignificant limitations, the parties (or in the case of panels, each party's selected arbitrator) have virtually absolute control over accepting or rejecting a nominee for the role of decision maker. It cannot therefore be left to the fox, who is the potential arbitrator, to guard the arbitration henhouse, secretly identifying to himself alone all "prior or present relationships," then just as secretly deciding which are worthy of disclosure and which are not. On the contrary, avoidance of partiality in the selection of the arbitrator can be achieved only if, in discharging his duty of disclosure, the potential arbitrator objectively disgorges absolutely every conceivable fact of prior or present relationships with parties or counsel, regardless of how tenuous or remote they might seem to him. He must leave to the parties the value judgment as to which

(if any) among those fully disclosed facts constitutes a basis for rejecting the potential arbitrator for bias or the appearance of bias. Only of and after that is done can *disclosure* translate into *disqualification* or rejection.

Thus the system fails when the nominee for the post of arbitrator takes it upon himself to make the value judgment whether a relationship is so inconsequential that it need not be disclosed at all. Arbitration's scant protection against bias and favoritism obviously breaks down completely when the question whether a relationship should be disclosed is assumed *sub silentio* by the potential arbitrator rather than by disclosing all and allowing the parties to make that call following their receipt of all facts through an unabridged disclosure.

Id. at 11-12; slip op. at 30-34 (emphasis in original)

CONCLUSION

For the reasons set forth above and in RDC's Petition, there is a clear and irreconcilable conflict among the Circuits and the states as to the standard to be applied in cases where an arbitrator fails to disclose a relationship with one of the parties, a conflict that is underscored by the majority and dissenting opinions from the *en banc* panel in *Positive Software.* The Court should grant certiorari to resolve that conflict.

Respectfully submitted,

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